

No. 16116

United States
Court of Appeals
for the Ninth Circuit

ROSE WONG and KENT WONG,
Appellants,
vs.

WALTER SWIER and LAURA SWIER,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Eastern District of Washington,
Southern Division

FILED

DEC 3 1958

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Defendants-Appellees, Swier.



In The United States District Court for
Eastern District of Washington

Civil Action No. 1137

ROSE WONG,

Plaintiff,

vs.

WALTER SWIER, LAURA SWIER, DR. JAMES
E. ZIMMERMAN, DR. LELAND R. LUGAR,
and YAKIMA VALLEY MEMORIAL HOS-
PITAL ASSOCIATION, Defendants.

COMPLAINT

(Damages)

Plaintiff complains of defendants and alleges:

1. Plaintiff is a citizen of the State of Idaho and the defendants are residents of the State of Washington. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

2. That on or about the 17th day of October, A.D., 1955, the plaintiff was employed by the defendants Walter Swier and Laura Swier as an apple picker in the said defendants' orchards in Cowiche, Washington, and that on the said date of October 17, 1955, it became the duty of plaintiff in the course of her said employment to go upon, and she did go upon, a ladder furnished to her by the said defendants Walter Swier and Laura Swier.

3. That it was the duty of said defendants Wal-

ter Swier and Laura Swier to furnish to plaintiff a safe and secure ladder for the performance of her said work, but that the said defendants on the contrary carelessly and negligently furnished to plaintiff an unsafe, defective and dangerous ladder, of which fact the plaintiff was ignorant.

4. That the said defendants failed to warn the plaintiff of the unsafe, defective and dangerous condition of said ladder, and that solely by reason of the dangerous and defective condition thereof, the ladder tipped and fell while plaintiff was upon the same in the performance of her said duties on the 17th day of October, 1955, and the plaintiff was precipitated to the ground, and sustained a left ankle compound comminuted fracture of the distal end of the shaft of the tibia and fibula and was otherwise injured.

5. That following the fall from the ladder and on the same day, to-wit October 17, 1955, the plaintiff was taken by ambulance to the Yakima Valley Memorial Hospital, Yakima, Washington, an institution operated by the defendant Yakima Valley Memorial Hospital Association, and was admitted to said hospital as a patient.

6. That Dr. James E. Zimmerman, a physician admitted to practice in the State of Washington, was called and employed to examine such broken ankle and ascertain the extent of the injury and to set and treat the same; and that the defendant Dr. James E. Zimmerman called in Dr. Leland R. Lugar, an orthopedic specialist, admitted to

practice in the State of Washington, and the said defendants, Dr. James E. Zimmerman and Dr. Leland R. Lugar, did enter upon the treatment and healing of said injury.

7. That the defendants, Dr. James E. Zimmerman and Dr. Leland R. Lugar, did not use due and proper care and skill in the care and treatment of plaintiff.

8. That the agents, servants and employees of the defendant Yakima Valley Memorial Hospital Association carelessly, negligently and unskillfully cared for and treated the plaintiff and failed to use due and proper care and skill in the treatment and care of the plaintiff.

9. That as a result of the carelessness and negligence of the defendants and each of them, and of the negligence of the defendants Dr. James E. Zimmerman, Dr. Leland R. Lugar, Yakima Valley Memorial Hospital Association and of the unskillful manner in which said latter three named defendants, and each of them, treated and cared for plaintiff, gas gangrene infection set in.

10. That as a result of the negligence of the defendants and each of them, plaintiff has sustained permanent injuries; a shortening of the left leg; permanent and severe scarring; has been prevented from following any occupation and will continue to be so prevented; has been prevented from caring for her family; has suffered great pain of body and mind; has incurred expenses for medical attention and hospitalization and will continue to incur

expenses therefor; has incurred expenses for orthopedic appliances and will continue to incur such expenses, all to her damage in the sum of One Hundred Thousand and no/100 Dollars.

Wherefore, plaintiff prays judgment against the defendants and each of them in the sum of \$100,000.00: interest from the commencement of this action; all costs of court and general relief.

DEAN W. MULLIN,
/s/ ALICE LOVELAND,
Attorneys for Plaintiff.

[Endorsed]: Filed August 29, 1956.

[Title of District Court and Cause.]

MOTION TO MAKE MORE DEFINITE AND CERTAIN

Defendants Walter Swier and Laura Swier move for an order making more definite and certain paragraph 3 of plaintiff's complaint, i.e., that part of such paragraph reading as follows: "but that the said defendants, on the contrary, carelessly and negligently furnished to plaintiff an unsafe, defective and dangerous ladder, of which fact the plaintiff was ignorant."

This motion is to cause plaintiff to set forth specifically the ground or grounds of such alleged carelessness and negligence, and further to set forth the respect or respects it is alleged that the alleged ladder was unsafe, defective and danger-

ous, and this motion is directed not only to said paragraph 3, but also to paragraphs 4, 9, and 10, of said complaint, as such further paragraphs also refer to alleged unsafe, defective and dangerous condition of said ladder and alleged carelessness and negligence in general and conclusionary terms.

/s/ HOMER B. SPLAWN,

Attorney for Defendants Walter
Swier and Laura Swier.

[Endorsed]: Filed January 22, 1957.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS SWIER

Defendants Swier answer plaintiff's complaint as follows:

I.

In respect of paragraph 1. thereof, these defendants acknowledge the same except the allegation as to plaintiff's citizenship and residence and the allegation with respect to the residence of defendant Lugar, which latter allegations are denied.

II.

In respect of paragraph 2. thereof, these defendants acknowledge that plaintiff was an employee of theirs on October 17, 1955, as an apple picker in their orchard at Cowiche, and that as such employee she used a ladder furnished by these defendants, and these defendants deny any other inference from such paragraph.

III.

In respect of paragraph 3. thereof, these defendants acknowledge that plaintiff was entitled to be furnished a reasonably safe ladder, but deny all the rest of such paragraph.

IV.

In respect of paragraph 4. thereof, these defendants deny the same, except that plaintiff received an injury, the exact nature and extent thereof being unknown to these defendants, so that part of such paragraph is denied upon the lack of sufficient independent knowledge to form a positive belief thereto, and these defendants state that there was no necessity for giving plaintiff any warning with respect to the ladder used by plaintiff.

V.

In respect of paragraph 5. thereof, these defendants acknowledge the same.

VI.

In respect of paragraph 6. thereof, these defendants acknowledge that Dr. James E. Zimmerman was called to examine plaintiff and treat her, and that he is a duly licensed physician, but in respect of the balance of such paragraph, these defendants stated that they do not have sufficient independent knowledge concerning the same as to form a positive belief thereto and so deny the rest of such paragraph upon such lack of sufficient independent knowledge on their part.

VII.

In respect of paragraph 7. thereof, these defendants state that they are not qualified and do not have sufficient independent knowledge to form a positive belief concerning such paragraph and so deny the same upon such lack of sufficient independent knowledge on their part.

VIII.

In respect of paragraph 8. thereof, these defendants make the same answer as to paragraph 7. thereof.

IX.

In respect of paragraph 9. thereof, these defendants deny any negligence on their part, or either of them, in any respect, and as to the balance of such paragraph, they state that they do not have sufficient independent knowledge concerning the same as to form a positive belief thereto and so deny the balance of such paragraph upon such lack of sufficient independent knowledge on their part.

Further answering plaintiff's complaint and as affirmative defenses thereto, these defendants state that, if plaintiff were injured because of any alleged condition of the ladder, such injury was proximately brought about and contributed to by her own negligence; that there was no defect in the ladder which had anything to do with any accident which befell plaintiff; and that whatever conditions existed in respect of the ladder and the use thereof were assumed by plaintiff and the risk thereof, if there were any risk attached thereto.

Wherefore, having fully answered plaintiff's complaint, these defendants ask that the same be dismissed.

/s/ HOMER B. SPLAWN,
Attorney for Defendants.

Duly Verified.

[Endorsed]: Filed March 25, 1957.

[Title of District Court and Cause.]

MOTION TO ADD PARTY PLAINTIFF

Come now Rose Wong, plaintiff, by her attorneys, and Kent Wong, and move this Honorable Court for an order adding the name of Kent Wong as a party plaintiff in this action; and

As Grounds For This Motion state unto the Court as follows:

That Kent Wong is the husband of Rose Wong and may have some interest in this action; that it is the desire of the plaintiff that he be made a party plaintiff herein; and that it is the desire of said Kent Wong to become voluntarily a party plaintiff in this said action in order that complete relief may be afforded herein.

/s/ ALICE LOVELAND,
/s/ GEORGE H. MULLINS,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 30, 1957.

[Title of District Court and Cause.]

ORDER

This Matter coming on to be heard upon Motion to Add Party Plaintiff, and the court having read said Motion, no objection being made and being now sufficiently advised in the premises, Doth Find:

That it would be proper to join and add as a party plaintiff herein Kent Wong, who is the husband of Rose Wong.

It Is, Therefore, Ordered, that Kent Wong be and hereby is joined and added as a party plaintiff herein.

Done In Open Court this 6th day of June, 1957.

By The Court:

/s/ SAM M. DRIVER,
Judge.

Presented by:

/s/ GEORGE H. MULLINS,
Of Counsel for Plaintiff.

Approved as to form:

/s/ JOHN GAVIN,
Of Counsel for Defendant
Hospital.

Approved as to form:

/s/ HOMER B. SPLAWN,
Counsel for Defendant Swier.

[Endorsed]: Filed June 6, 1957.

In The United States District Court, Eastern
District of Washington, Southern Division

No. 1137

ROSE WONG,

Plaintiff,

vs.

WALTER SWIER, LAURA SWIER, DR. JAMES
E. ZIMMERMAN, DR. LELAND LUGAR
and YAKIMA VALLEY MEMORIAL HOS-
PITAL ASSOCIATION, Defendants,

KENT WONG,

Additional Plaintiff.

REQUEST AND MOTION BY DEFENDANTS
SWIER FOR JURY TRIAL

Defendants Swier respectfully request and move
for jury trial of all issues of fact herein.

This request and motion is based upon the files
and records herein, including the Answer of De-
fendants Swier With Respect to Additional Party
Plaintiff, and following affidavit.

/s/ HOMER B. SPLAWN,

Attorney for Said Defendants.

State of Washington,
County of Yakima—ss.

Homer B. Splawn, being sworn, on oath says:
He is said defendants' attorney herein; an addi-
tional party plaintiff was added herein on June
6, 1957; on June 7, 1957, said defendants made an-

swer to said additional party plaintiff and stated a counterclaim against him, all as appears from said Answer of Defendants Swier With Respect to Additional Party Plaintiff, filed herein on June 10, 1957; assignment for jury trial will not delay this case being tried; and it is a proper case for jury trial.

/s/ HOMER B. SPLAWN,

Subscribed and sworn to before me this 7th day of June, 1957.

[Seal] /s/ LORETTA RUDICK,
Notary Public in and for the State of Washington,
residing at Yakima.

[Endorsed]: Filed June 10, 1957.

[Title of District Court and Cause.]

APPLICATION FOR LEAVE TO AMEND ANSWER OF DEFENDANTS SWIER TO COMPLAINT OF ROSE WONG

Application is hereby made to the court for leave to amend the answer of defendants Swier (heretofore filed and served herein) to the complaint of Rose Wong, by the addition of a paragraph to be numbered "X", to follow paragraph "IX" of such answer and to read:

"In respect of paragraph 10 of said complaint these defendants deny any negligence on their part, or either of them, and deny the balance of such paragraph, the denial as to the

alleged medical and hospital matters being upon the lack of sufficient independent knowledge as to form a positive belief as to such alleged matters.”

Attached hereto is a copy of said answer as so amended.

Dated June 7, 1957.

/s/ HOMER B. SPLAWN,

Attorney for Said Defendants.

State of Washington,
County of Yakima—ss.

Homer B. Splawn, being sworn, on oath says: He is said defendants' attorney herein; until today he had inadvertently overlooked the fact that paragraph 10 of the complaint of Rose Wong was inadvertently not answered; so leave is respectfully asked of the court to add the above paragraph to the answer of said defendants to said complaint.

/s/ HOMER B. SPLAWN.

Subscribed and sworn to before me this 7th day of June, 1957.

[Seal] /s/ LORETTA RUDICK,

Notary Public in and for the State of Washington,
residing at Yakima.

[Note: Amended Answer is the same as set out at pages 7-10 except for the amendment stated above.]

[Endorsed]: Filed June 10, 1957.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS SWIER WITH
RESPECT TO ADDITIONAL PARTY
PLAINTIFF

An additional plaintiff having been added herein, viz., Kent Wong, on June 6, 1957, defendants Swier answer him as follows:

1.

They deny any diversity of citizenship or residence on his part.

2.

They acknowledge that Rose Wong was an employee of theirs on October 17, 1955, as an apple picker in their orchard at Cowiche, and that as such employee she used a ladder furnished by these defendants, and these defendants deny any other inference contained in paragraph 2. of her complaint.

3.

These defendants acknowledge that Rose Wong was entitled to be furnished a reasonably safe ladder, but deny the rest of paragraph 3 of her complaint.

4.

These defendants deny paragraph 4 of her complaint except that she received an injury, the exact nature and extent thereof being unknown to these defendants, so that part of such paragraph is denied upon the lack of sufficient independent knowledge, and these defendants state that there was no necessity for giving her any warning with respect

to the ladder used by her and that, if there were any duty to give her any warning because of any asserted defect (denying that there was any), the same devolved upon said additional plaintiff, as hereinafter alleged.

5.

These defendants acknowledge paragraph 5 of Rose Wong's complaint.

6.

These defendants acknowledge that Dr. James E. Zimmerman was called to examine Rose Wong and treat her and that he is a duly licensed physician, but the balance of paragraph 6 of her complaint is denied upon the lack of sufficient independent knowledge concerning the same as to form a positive belief.

7.

As to paragraphs 7 and 8 of her complaint, these defendants state that they do not have sufficient independent knowledge about the same as to form a positive belief and so deny the same.

8.

As to paragraph 9 thereof, these defendants deny any negligence on their part, or either of them, in any respect, and deny the balance of such paragraph upon the lack of sufficient independent knowledge to form a positive belief.

9.

As to paragraph 10, thereof, these defendants deny, as stated above, any negligence on their part, or either of them, and deny the balance of such

paragraph, the denial as to the alleged medical and hospital matters being upon the lack of sufficient independent and accurate or exact knowledge as to form a positive belief as to such alleged matters.

Further answering, these defendants state that, if Rose Wong were injured because of any asserted condition of the ladder, such injury was proximately brought about and contributed to by her own negligence, as specifically stated in open court; that there was no defect in the ladder which had anything to do with any accident which befell her; and that whatever conditions existed in respect of the ladder and the use thereof were assumed by her and the risk thereof, if there were any risk attached thereto.

Further answering said additional plaintiff, these defendants state that, if there were any defective condition or conditions in the ladder amounting to negligence as claimed by plaintiff Rose Wong (these defendants denying any negligence on their part), then he, the said Kent Wong, became responsible therefor for the reason that, when the ladders were furnished to the Wong family at the beginning, it was requested verbally that he report any defect in their ladders that might arise and become noticeable in their use of the same, to which he assented verbally as a part of his employment with these defendants, so that, if such a defect arose and was serious enough to amount to negligence, then he breached his contract of employment and cannot recover, nor can plaintiff Rose Wong likewise, as

he failed to report any defect, let alone any defective condition rendering the ladder unsafe for ordinary use in an orchard and, had there been any such defective condition arise and been reported, the same would have been thereupon remedied, and the injury of plaintiff Rose Wong, if due to anyone's failure in respect of asserted condition or conditions of the ladder, if any, was due to the said Kent Wong's failure as above alleged, and these defendants repeat that actually there was no negligent condition of the ladder and no condition of the same which had anything to do with the accident.

Further answering and as a counterclaim against said additional plaintiff, these defendants allege:

1.

One, Kent Wong, became a party plaintiff in this action on June 6, 1957. He is the husband of Rose Wong, the other plaintiff.

2.

Rose Wong is seeking to recover damages from these defendants for allegedly having furnished her an allegedly unsafe ladder, alleging that the ladder thus fell, precipitating her to the ground and injuring her, all as set out in her pleadings herein.

3.

If there were any defective condition or conditions in the ladder amounting to negligence as claimed by plaintiff Rose Wong (these defendants

denying any negligence on their part), then he, the said Kent Wong, became responsible therefor for the reason that, when the ladders were furnished to them in the beginning, it was requested verbally that he report any defect therein that might arise and become noticeable in their use of the same, to which he assented verbally as a part of his employment with these defendants.

4.

If such a defect arose and was serious enough to amount to negligence, then he breached his contract of employment and cannot recover, nor can plaintiff Rose Wong likewise, since he failed to report any defect, let alone any defective condition rendering the ladder unsafe for ordinary use in the orchard and, had there been any such defective condition arise and been reported, the same would have been thereupon remedied.

5.

The injury to plaintiff Rose Wong, if due to anyone's failure in respect of asserted condition or conditions of the ladder, if any, was due to the said Kent Wong's failure as above alleged, as there could have been no other such condition or conditions occur than as mentioned in paragraph 3.

6.

Said additional plaintiff, therefore, is liable to these defendants for any claim or loss, if there is any, herein.

Wherefore, these defendants ask that plaintiff Rose Wong and the additional plaintiff, Kent Wong, take no verdict or judgment herein against these defendants; that in case of a verdict or judgment these defendants have one for like amount against them; and for such other relief as is called for in the premises.

/s/ HOMER B. SPLAWN,
Attorney for Said Defendants.

Duly Verified.

[Endorsed]: Filed June 10, 1957.

[Title of District Court and Cause.]

**OBJECTION TO REQUEST OF MOTION FOR
JURY TRIAL BY DEFENDANTS SWIER**

Comes Now the plaintiff, by her attorneys, and hereby objects to the granting of defendants Swier's request and motion for jury trial; and,

As Grounds For This Motion states unto the court that said request and motion is not timely and is not in accordance with the provisions of the Federal Rules of Civil Procedure, to-wit: Rule 38B.

/s/ THOMAS K. HUDSON,
/s/ ALICE LOVELAND,
/s/ GEORGE H. MULLINS,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 17, 1957.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

As the result of a pre-trial conference heretofore had on the 6th day of June, A.D. 1957, in the United States Courthouse, Yakima, Washington, whereat the Honorable Sam M. Driver presided, the plaintiffs were represented by Thomas K. Hudson and Alice Loveland, and the defendants Walter Swier and Laura Swier were represented by Homer B. Splawn, and the defendant Dr. James E. Zimmerman was represented by Robert R. Redman and John S. Moore, and the defendant Yakima Valley Memorial Hospital Association was represented by Robert R. Redman and George Martin, attorneys of record, the following issues of fact and law were framed and exhibits identified.

Nature of Proceedings

This is an action for damages brought by the plaintiffs against the defendants for injuries sustained by the plaintiff Rose Wong and alleged to have been proximately caused by the negligence of the defendants.

Admitted Facts

The following facts have been agreed upon by the parties and require no proof:

1. That all defendants are residents of the State of Washington; that plaintiffs are residents and citizens of the State of Idaho; and that this Court has jurisdiction herein.

2. That the plaintiff Rose Wong was on October 17, 1955, in the employ of the defendants Walter Swier and Laura Swier, and that as such employee she used a ladder furnished by these defendants, and that said defendants Walter Swier and Laura Swier were under a duty to furnish said plaintiff a safe ladder.

3. That the plaintiff Rose Wong sustained injuries by reason of a fall from said ladder in the course of her employment.

4. That the defendant Dr. James E. Zimmerman was contacted with reference to the treatment and care of said plaintiff.

5. That said plaintiff was taken to and admitted to the Yakima Valley Memorial Hospital in Yakima, Washington, operated by defendant Yakima Valley Memorial Hospital Association.

6. That while the plaintiff Rose Wong was a patient in said hospital gas gangrene developed.

7. That the medical bill of Dr. James E. Zimmerman for treating Rose Wong is unpaid, and that said bill was not rendered until June 19, 1957; and that the hospital bill rendered to her by the Yakima Valley Memorial Hospital is unpaid.

Plaintiffs' Contentions

Plaintiffs' contentions are as follows:

1. That the ladder furnished to the plaintiff Rose Wong by the defendants Walter Swier and Laura Swier was an unsafe, defective and danger-

ous ladder, of which fact the plaintiff was ignorant, and that the defendants Walter Swier and Laura Swier failed to warn the plaintiff of the unsafe, defective and dangerous condition of said ladder, which unsafe, defective and dangerous condition of said ladder was known or should have been known by the defendants Walter Swier and Laura Swier; that such defective and unsafe condition included but was not limited to the following defects:

(a) That the metal plate and bolt assembly at the top of the ladder was defective.

(b) That the tongue of the ladder was defective.

(c) Any other way in which said two situations could be described.

(d) Other defects latent or patent.

2. That plaintiff's fall was proximately caused by the defective condition of the ladder; that by reason of the fall from the ladder plaintiff sustained a left ankle compound comminuted fracture of the distal end of the shaft of the tibia and fibula, and was otherwise injured.

3. That following the fall from the ladder and on the same day, to-wit, October 17, 1955, plaintiff Rose Wong was taken by ambulance to the Yakima Valley Memorial Hospital in Yakima, Washington, and was admitted to said hospital as a patient of Dr. James E. Zimmerman.

4. That Dr. James E. Zimmerman, a physician admitted to practice in the State of Washington, was called and entered upon the care and treatment of said plaintiff.

5. That the fall and resulting injury occurred at approximately 10:30 o'clock in the A.M. on October 17, 1955, and that the fracture was reduced and a short cast applied at approximately 1:00 o'clock P.M. on the same day at the Yakima Valley Memorial Hospital; that at said time no tetanus or gas gangrene antitoxin shots were administered to the plaintiff, and that the defendant Dr. James E. Zimmerman failed to use methods recognized and approved by those reasonably skilled in that profession in said community and failed to administer the customary and recognized drugs to prevent gangrene and infection, and that plaintiff Rose Wong developed gas gangrene; that said condition was obvious and was ignored by the defendants Dr. James E. Zimmerman and Yakima Valley Memorial Hospital after such infection and condition was obvious and after being advised thereof; and that no antitoxin for infection or gangrene or gas gangrene was administered to plaintiff until a week after the setting of the fracture and until after infection had set in and was obvious, and that the defendant Dr. James E. Zimmerman failed to give proper medical attention to the said plaintiff.

6. That as a proximate result of the negligence of the defendants and each of them, plaintiff has sustained temporary and permanent injuries and disabilities consisting of a shortening of the left leg, permanent and severe scarring, permanent, constant and continual pain; has been and will con-

tinue to be prevented from following any occupation and from caring for her family, and has suffered and will continue to suffer great pain of body and mind.

7. That said plaintiffs have incurred expenses for medical attention in the sum of \$1,135.00, have incurred expenses for hospitalization in the sum of \$1,842.57, have incurred expenses for drugs in the sum of \$360.00, have incurred expenses for orthopedic appliances in the sum of \$55.00.

8. That the special damages proximately resulting from the negligence of the defendants and each of them are in the sum of \$3,392.57, and that the general damage proximately resulting therefrom is in the sum of \$97,600.00.

9. That plaintiffs will continue to incur expenses for medical attention, hospitalization, drugs and orthopedic appliances.

Contentions of Defendants Walter Swier
and Laura Swier

In addition to the facts admitted as hereinabove outlined, these defendants contend:

That the plaintiff Rose Wong assumed whatever risks were entailed in the condition of the ladder or the use made of it or expected of it.

They further contend that said plaintiff in the use of the ladder was negligent in that she endeavored to use the ladder while she herself got into an unbalanced position endeavoring to pick

fruit at an angle and a distance from the ladder so as to cause her and the ladder to become unbalanced and to fall, or, because of the way in which she fell and the ladder fell, she did not set it properly in the first instance, or in the use of the picking bag she positioned it so that it obstructed a balanced use of the ladder and put her into an unbalanced position with respect to the ladder, or she was not attentive to the fact that she was in an unbalanced position, or was not paying sufficient attention to the fact that in the use of the ladder she could not extend her body to the degree and angle which she must have done, or she permitted herself to slip on the rung of the ladder on which she was standing so that she did not have a firm footing.

In addition, these defendants contend that, if there were any defective condition or conditions in the ladder amounting to negligence as claimed by the plaintiffs, the plaintiff Kent Wong became responsible therefor for the reason that, when the ladders were furnished to the Wong Family, it was requested verbally that he report any defect in their ladders that might arise or become noticeable in their use of the same, to which he assented verbally as a part of his employment with these defendants. That, if such a defect arose, then he breached his contract of employment, by which he and the other said plaintiff are bound, since he, Kent Wong, failed to report any defect, let alone any defective condition rendering the ladder unsafe

for ordinary use in the orchard, and, had there been any such defective condition arise or become noticeable, the same would have been thereupon remedied. That the claimed defects would come under such contract of employment.

Contentions of Defendant

Dr. James E. Zimmerman

It is the contention of Dr. James E. Zimmerman that the circumstances of his employment require and authorize him to arrange for the immediate treatment and surgical care of Rose Wong by a specialist in that line of work and that he obtained for Rose Wong the services of Dr. Leland R. Lugar, an orthopedic surgeon of Yakima, who undertook her care and surgery upon her admission to the defendant hospital and that the post-operative and operative procedures employed and to be employed upon Rose Wong were determined by said Dr. Lugar.

It is further his contention that any standard of what should or should not be done by the attending doctor insofar as the administration of the tetanus antitoxin or gas gangrene antitoxin or any other preventive in cases of this type was met; that gas gangrene will develop and does develop regardless of whether preventives are or are not given, and that there is no causal connection between the administration or non-administration of any such antitoxins or preventives in this case and the injuries or damage of which plaintiff Rose Wong complains.

That at all times plaintiff was in the hospital and subsequent thereto, she received proper medical attention; and there is no injury or damage of which plaintiff complains which is attributable to any conduct of the defendant Dr. James E. Zimmerman.

Contentions of Defendant Yakima Valley Memorial Hospital Association

It is the contention of the defendant Yakima Valley Memorial Hospital Association that the plaintiff received proper hospital care and, further, that her care administered by servants of the hospital was care that was ordered by the doctors and in keeping with medical instructions given. It is further the position of the hospital that the allegations set forth by plaintiff's complaint and bill of particulars do not constitute actionable negligence on the part of the hospital.

It is the further contention of the defendant hospital association that it is entitled by cross claim to a judgment against the plaintiffs for the reasonable and agreed value of the hospital care and service which it furnished during the hospitalization of Rose Wong, which said sum the hospital association contends is in the reasonable and agreed amount of \$1,492.57.

Issues of Fact

The following are the issues of fact to be determined by the jury herein:

1. Was the ladder furnished by defendants

Laura Swier and Walter Swier so defective and unsafe in the respects previously set out herein that it was not a safe ladder for the use for which it was intended and furnished, according to the standard of the law of the State of Washington?

2. Did the plaintiff Rose Wong assume the risk, if any, of said conditions, if any, and the risk of using the ladder in the condition in which it actually was?

3. Was the plaintiff Rose Wong negligent in the use of the ladder in the respects previously alleged?

4. May the defendants Walter Swier and Laura Swier properly assert as a defense to plaintiffs' claim herein that the additional party plaintiff Kent Wong breached his contract of employment in failing to report any alleged defective conditions of the ladder involved in this action?

5. Was there any negligence of omission or commission on the part of Dr. James E. Zimmerman or Yakima Valley Memorial Hospital Association or either of them which was a proximate cause of injury and damage to the plaintiff Rose Wong?

6. What damage, if any, was occasioned Rose Wong as a proximate result of the negligence, if any, of the defendants Walter Swier and Laura Swier?

7. What damage, if any, was occasioned plaintiff Rose Wong as a proximate result of the negligence of Dr. James E. Zimmerman and defendant

Yakima Valley Memorial Hospital Association or either of them?

8. May the defendant Yakima Valley Memorial Hospital Association properly assert a cross claim for hospital care and service which it furnished to plaintiff Rose Wong and, if established, is the defendant Yakima Valley Memorial Hospital Association entitled to have judgment upon a cross claim against the plaintiffs for the reasonable value of the hospital care and service it furnished to Rose Wong which it alleges to be in the sum of \$1,492.57?

Exhibits

The following exhibits were produced and marked and may be received in evidence if otherwise admissible without further authentication, it being admitted that each is what it purports to be.

Plaintiffs' Exhibit:

1. Ladder. The ladder is in the possession of Mr. Homer B. Splawn, counsel for defendants Swier, and is available for inspection at any time.

Defendants' Exhibits:

1. Admission and discharge card for plaintiff from Yakima Valley Memorial Hospital Association.

2. Nurses' record.

3. Hospital file.

8. Pharmacy record at hospital.

The following articles to be used as exhibits by

the defendants were not presented at this pre-trial conference, but will be made available to all counsel at least three days before trial:

4. X-rays of Drs. Lynch and Downing.
5. X-rays of Dr. Angland.
6. X-rays of Dr. Zimmerman.
7. Hospital bill.
9. Ten or less photographs of ladder and site.
10. Ten or less ladders.
11. Ten or less ladder top assemblies.
12. Box of dirt.
13. Picking bag similar to one being used by plaintiff at time of fall.
14. Loose apples.
15. Steel wire.

It Is Hereby Ordered that the foregoing constitutes the pre-trial order in the above entitled cause, and that upon the filing hereof the pleadings pass out of the case and are superseded by this order, which shall not be amended except by consent of the parties or by order of the Court to prevent manifest injustice.

Dated this 13th day of February, 1958.

/s/ SAM M. DRIVER,
Judge.

The foregoing form of pre-trial order is hereby approved.

/s/ THOMAS K. HUDSON,
/s/ ALICE LOVELAND,
Attorneys for Plaintiffs.

/s/ HOMER B. SPLAWN,
 Attorney for Defendants Walter
 Swier and Laura Swier.

/s/ JOHN GAVIN,

/s/ ROBERT R. REDMAN,

/s/ JOHN S. MOORE,

Attorneys for Defendant Dr.
 James E. Zimmerman.

GAVIN, ROBINSON &
 KENDRICK,

/s/ By JOHN GAVIN,

/s/ ROBERT R. REDMAN,

/s/ GEORGE MARTIN,

Attorneys for Defendant Yakima Valley Memorial
 Hospital Association.

[Endorsed]: Filed February 13, 1958.

[Title of District Court and Cause.]

REQUEST FOR ADDITIONAL INSTRUCTIONS

Come now the plaintiffs, by their attorneys, and request this Honorable Court to give to the jury the Instructions attached hereto, Numbered 19 to 21, being in addition to instructions previously tendered by plaintiffs.

Dated this 28th day of March, 1958.

/s/ THOMAS K. HUDSON,
 /s/ ALICE LOVELAND,
 /s/ GEORGE H. MULLINS,
 Attorneys for plaintiffs.

Instruction No. 19

You are instructed that a party to a law suit is bound by the statements and testimony of his own witnesses. The defendants Swier are bound by the testimony of their witnesses who testified that the ladder was not at the time of trial in the same condition as when previously examined by them.

Instruction No. 20

You are instructed that a party's falsehood or other fraud in the preparation and presentation of his case, his fabrication, alteration and all similar conduct, is an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the case's lack of truth and merit. That inference does not apply to any one fact in the case, but operates strongly against the whole mass of facts constituting his case.

You are therefore further instructed that the changes or alterations in the ladder which occurred subsequent to the time of the accident on October 17, 1955, cast suspicion on the whole of the defense of Swiers and create a strong presumption that the ladder on the date of the accident was defective.

Instruction No. 21

You are instructed that all efforts by a party to a suit, directly or indirectly, to destroy, alter, fabricate or suppress evidence is in the nature of an admission by such party that he has no sufficient

case unless aided by suppressing evidence, or by the alteration or fabrication of more evidence.

[Endorsed]: Filed March 28, 1958.

[Title of District Court and Cause.]

VERDICT

We, The Jury In The Above Entitled Cause, find for the defendants.

/s/ KENNETH B. ELLEDGE,
Foreman.

If we find in favor of the Wongs—were your instructions to the effect—that we were to consider her remaining 25 years and 77 days—for a method of compensation—Yes or No.

/s/ KENNETH B. ELLEDGE,
Foreman.

[Endorsed]: Filed March 28, 1958.

In The District Court of the United States, Eastern
District of Washington, Southern Division

No. 1137

ROSE WONG and KENT WONG, her husband,
Plaintiffs,

vs.

WALTER SWIER and LAURA SWIER, hus-
band and wife, Defendants.

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, Honorable Sam M. Driver presiding, with all parties appearing by counsel and the issues having been duly tried, and the jury, on the 28th day of March, 1958, having rendered a verdict for the defendant,

It Is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant recover of the plaintiff his costs of action.

Dated at Yakima, Washington, this 28th day of March, 1958.

STANLEY D. TAYLOR,
Clerk,

/s/ By THOMAS GRANGER,
Deputy.

[Endorsed]: Filed March 28, 1958.

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT AND
JUDGMENT and TO ENTER JUDGMENT
FOR PLAINTIFFS, OR IN THE ALTER-
NATIVE FOR A NEW TRIAL

Come now the plaintiffs, by their attorneys, and move this Honorable Court to set aside the verdict and judgment against the plaintiffs entered thereon, and to enter judgment for the plaintiffs in accordance with their Motion for Directed Verdict, or if the foregoing motion be denied, to set aside the verdict and judgment entered thereon and grant to plaintiffs a new trial for the following reasons, to-wit:

(1) The Court should have granted plaintiffs' Motion for a Directed Verdict at the close of all the evidence because defendants' evidence was insufficient in law.

(2) All the evidence is insufficient in law to form a basis for a verdict in favor of the defendants.

(3) The verdict is contrary to law.

(4) The verdict is not sustained by sufficient evidence.

(5) The verdict is against the weight of the evidence.

(6) The verdict is against the law and the evidence.

(7) The court erred in denying plaintiffs' Motion for a directed verdict in their favor at the close of all the evidence.

(8) The evidence shows that the proximate cause of plaintiff Rose Wong's injuries was the defective ladder.

(9) The evidence shows that the ladder was in the possession of the defendants Swier at all times and that said ladder had been tampered with.

(10) That the court erred in instructing the jury relative to contributory negligence, relative to an unavoidable accident and relative to assumption of risk for the reason that said doctrines had no application in this case.

(11) That the court erred in refusing plaintiffs' requested Instruction No. 19.

(12) That the court erred in refusing plaintiffs' requested Instruction No. 20.

(13) That the court erred in refusing plaintiffs' requested Instruction No. 21.

(14) Under the pre-trial order and all of the evidence in the case the verdict should be in favor of the plaintiffs.

(15) That the jury misunderstood the measure of damages as shown by the question attached to the verdict and believed that they had to give \$100,000 or nothing.

(16) Plaintiffs further rely upon the Affidavits

hereto attached and by reference made a part hereof.

Dated this 3rd day of April, A.D. 1958.

/s/ THOMAS K. HUDSON,

/s/ ALICE LOVELAND,

/s/ GEORGE H. MULLINS,

Attorneys for Plaintiffs.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 4, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF VINCENT A. NOGA

State of Washington,
County of Yakima—ss.

Vincent A. Noga, of lawful age, being first duly sworn upon his oath deposes and says:

That he was a juror on the duly empaneled jury which sat in the case of Rose Wong, plaintiff, vs. Walter Swier and Laura Swier, defendants, being Civil Action No. 1137, in the United States District Court for the Eastern District of Washington, Southern Division, which jury returned a verdict on the 28th day of March, A.D. 1958, in favor of the defendants;

That the members of the jury found in their deliberations that the ladder which was in evidence, being designated as plaintiff's exhibit 1, had been tampered with; and further found that the sub-

stance on the bolts connecting the hinge assembly with the top of the ladder was not paint but was putty and ascertained this fact both by smelling said substance and by tasting the same.

Further affiant saith not.

/s/ V. A. NOGA.

Subscribed and sworn to before me this 5th day of April, A.D. 1958.

[Seal] /s/ GEORGE H. MULLINS,
Notary Public. My Commission Expires: December 4, 1960.

[Endorsed]: Filed April 7, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT MASTERMAN

State of Washington,
County of Yakima—ss.

Robert Masterman, of lawful age, being first duly sworn, upon his oath deposes and says:

That he was a juror on the duly empaneled jury which sat in the case of Rose Wong, plaintiff, vs. Walter Swier and Laura Swier, defendants, being Civil Action No. 1137 in the United States District Court for the Eastern District of Washington, Southern Division, which jury returned a verdict on the 28th day of March, A.D. 1958 in favor of the defendants;

That the members of the jury found in their de-

liberation that the ladder which was in evidence, being designated as plaintiff's exhibit 1, had been tampered with; and further found that the substance on the bolts connecting the hinge assembly with the top of the ladder was not paint but was putty and ascertained this fact both by smelling said substance and by tasting the same.

Further affiant saith not.

/s/ ROBERT MASTERMAN.

Subscribed and sworn to before me this 6th day of April, A.D. 1958.

[Seal] /s/ GEORGE H. MULLINS,
Notary Public. My Commission Expires: December 4, 1960.

[Endorsed]: Filed April 7, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF GORDON BECK

State of Washington,
County of Benton—ss.

Gordon Beck, of lawful age, being first duly sworn, upon his oath deposes and says;

That he was a juror on the duly empaneled jury which sat in the case of Rose Wong, plaintiff, vs. Walter Swier and Laura Swier, defendants, being Civil Action No. 1137 in the United States District Court for the Eastern District of Washington, Southern Division, which jury returned a ver-

diet on the 28th day of March, A.D. 1958 in favor of the defendants;

That there was no finding by the members of the jury that the ladder in evidence, being Plaintiff's Exhibit 1, had been tampered with; no vote or finding by the jury was taken or made in that respect; the jury discussed the question of whether the ladder had been tampered with, but no vote was taken or conclusion arrived at that it had been tampered with; the majority of the members of the jury never smelled or tasted any substance on the bolts at the top and no conclusion was arrived at concerning such matters.

/s/ GORDON E. BECK.

Subscribed and sworn to before me this 8th day of April, 1958.

[Seal] /s/ HOMER B. SPLAWN,
Notary Public. My Commission Expires: January 23, 1960.

[Endorsed]: Filed April 16, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF HOMER B. SPLAWN

State of Washington,
County of Yakima—ss.

Homer B. Splawn, the attorney of record herein for the defendants, Walter Swier and Laura Swier, herein, being first duly sworn, on oath deposes and says:

That he is said attorney of record; and that subdivision (15) of the motion to set aside the verdict and judgment and enter judgment for the plaintiffs or, in the alternative, for a new trial, herein, is erroneous, as:

There was nothing and there is nothing attached to the verdict herein; the yellow piece of paper appearing in the file herein was handed to the bailiff, as this affiant has been informed by both the bailiff and Thomas Granger, deputy clerk, probably forty-five minutes before the jury returned its verdict, so that the same is no part of the verdict and is not connected therewith; such piece of paper in no wise furnishes a basis for any such belief as is indicated in said subdivision (15); and it is perfectly obvious that whatever inquiry the jury may have had in mind, the same was resolved by the jury and thereafter it returned its verdict herein, which is an absolutely unconditional verdict.

/s/ HOMER B. SPLAWN.

Subscribed and sworn to before me this 9th day of April, 1958.

[Seal] /s/ ROBERT I. BOUNDS,
Notary Public in and for the State of Washington,
residing at Yakima.

[Endorsed]: Filed April 16, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF KENNETH B. ELLEDGE

State of Washington,
County of Benton—ss.

Kenneth B. Elledge, being sworn, on oath says:
I was foreman on the jury in the case of Rose
Wong vs. Walter Swier and wife, Civil Cause No.
1137.

There was speculation as to whether or not the
ladder in evidence had been tampered with and the
speculation was that someone on either side could
have done it just as well. If it had been tampered
with: This was speculation only, and there was no
finding, conclusion or ballot on that question at all.
This speculation concerning tampering had no bear-
ing at all upon the verdict. There was no finding
that the substance on the bolts was putty.

/s/ KENNETH B. ELLEDGE.

Subscribed and sworn to before me this 11th day
of April, 1958.

[Seal] /s/ HOMER B. SPLAWN,
Notary Public. My commission
expires January 23, 1960.

[Endorsed]: Filed April 16, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF WARD M. FRANCIS

State of Washington,
County of Yakima—ss.

Ward Francis, being sworn, on oath says:

I was a juror on the jury in the case of Wong vs. Swier, United States District Court Civil Cause No. 1137.

There was no finding on the part of the jury that the ladder in evidence had been tampered with; there was no ballot or vote taken to affirm or disregard that such had been the case; there was speculation as to its having been tampered with by unknown parties and as to its not having been tampered with at all; no conclusion was arrived; it was felt that there was no evidence that it had or had not been tampered with; such speculation had no bearing upon the verdict; as to any substance on the bolts or lack of substance on the bolts there was no conclusion arrived at by the members of the jury.

/s/ WARD M. FRANCIS.

Subscribed and sworn to before me this 15th day of April, 1958.

[Seal] /s/ HOMER B. SPLAWN,
Notary Public. My commission
expires January 23, 1960.

[Endorsed]: Filed April 16, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT MASTERMAN

State of Washington,
County of Yakima—ss.

Robert Masterman, being sworn, on oath says:

I was a juror in the case of Wong v. Swier, Civil
Action No. 1137.

So far as I could determine, any tampering with
the ladder had no bearing on the decision of the
jury.

/s/ ROBERT MASTERMAN.

Subscribed and sworn to before me this 16th day
of April, 1958.

[Seal] /s/ HOMER B. SPLAWN,
Notary Public in and for the State of Washington,
residing at Yakima. My commission expires
January 23, 1960.

[Endorsed]: Filed April 16, 1958.

In the District Court of the United States, Eastern
District of Washington, Southern Division

Civil No. 1137

ROSE WONG, Plaintiff,

vs.

WALTER SWIER, LAURA SWIER, DR.
JAMES E. ZIMMERMAN, DR. LELAND
LUGAR and YAKIMA VALLEY MEMO-
RIAL HOSPITAL ASSOCIATION,
Defendants,

KENT WONG, Additional Plaintiff.

ORDER DENYING MOTION TO SET ASIDE
VERDICT AND JUDGMENT AND TO
ENTER JUDGMENT FOR PLAINTIFFS,
OR IN THE ALTERNATIVE FOR A NEW
TRIAL

Upon the files and records herein, including the Motion to Set Aside Verdict and Judgment and to Enter Judgment for Plaintiffs, or in the Alternative for a New Trial, such motion having duly come on to be heard by the above entitled Court on Monday, May 19, 1958, and the same having been duly argued, and the Court having duly considered and denied the same, now, in pursuance thereof:

It Is Hereby Ordered that said motion be, and the same is hereby, denied.

Dated May 28th, 1958.

/s/ SAM M. DRIVER,
Judge.

Presented by:

/s/ HOMER B. SPLAWN,
Attorney for Defendants Swier.

Notice of Mailing Attached.

[Endorsed]: Filed May 28, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Come now the plaintiffs, Rose Wong and Kent Wong, and hereby file their Notice of Appeal to the United States Court of Appeals for the Ninth Circuit, from that certain order and judgment entered by the Honorable Sam M. Driver, Judge, on the 28th day of March, A.D. 1958, in favor of the defendants Walter Swier and Laura Swier, and against the plaintiffs herein.

Dated this 13th day of June, A.D. 1958.

/s/ THOMAS K. HUDSON,
/s/ ALICE LOVELAND,
Attorneys for plaintiffs.

Notice of Mailing Attached.

[Endorsed]: Filed June 16, 1958.

[Title of District Court and Cause.]

COST BOND

Know All Men by These Presents: That we, Rose Wong, and Fidelity and Deposit Company of Maryland, are held and firmly bound unto Walter Swier and Laura Swier in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said Walter Swier and Laura Swier, their heirs or assigns, to which payment well and truly to be made we bind ourselves, our successors or assigns, jointly and severally, by these presents. Sealed with our seals and dated this 10th day of June, A.D. 1958.

Whereas, lately on the 28th day of March, A.D. 1958, in the United States District Court for the Eastern District of Washington, Southern Division, in a suit pending in said court between Rose Wong, plaintiff, and Walter Swier and Laura Swier, defendants, judgment was rendered against the said plaintiff, Rose Wong, and the said plaintiff has taken an appeal to the United States Court of Appeals for the Ninth Circuit to reverse the judgment in the aforesaid suit.

Now, the condition of the above obligation is such that if the said plaintiff Rose Wong shall prosecute said appeal to effect, and answer all costs if she fails to make good her plea, then the above obligation to be void, else to remain in full force and virtue.

ROSE WONG.

[Seal] FIDELITY AND DEPOSIT COM-
PANY OF MARYLAND,
/s/ By CLARENCE T. PAMP,
Attorney-in-fact.

[Endorsed]: Filed June 16, 1958.

[Title of District Court and Cause.]

MOTION

Come now the appellants by their attorneys and move this Honorable Court for an Order directing that appellants' Designation of Contents of Record on Appeal be accepted without the inclusion of the transcript of testimony at the trial, and that they be permitted to file such transcript on a subsequent date and as soon as received from the Reporter, and

As Grounds for This Motion, state unto the Court as follows:

1 That on the 21st day of May, A.D. 1958, counsel ordered the transcript from the Reporter, Mr. C. R. Shuff, and on the 23rd day of May, 1958, counsel received from said Reporter an acknowledgment of the order for the transcript; that said transcript is not yet ready for delivery to counsel; that as soon as said transcript is delivered by the Reporter to counsel, it will be filed herein.

/s/ THOMAS K. HUDSON,
/s/ ALICE LOVELAND,
Attorneys for Plaintiffs.

[Endorsed]: Filed July 3, 1958.

[Title of District Court and Cause.]

CERTIFICATE

I Hereby Certify that I duly served the Designation of Contents of Record on Appeal, Statement of Points Relied Upon, and Motion by depositing in the United States mail, postage prepaid, true and correct copies thereof addressed to Mr. Homer B. Splawn, Attorney at Law, Larson Building, Yakima, Washington, on the 2nd day of July, 1958.

/s/ ALICE LOVELAND.

[Endorsed]: Filed July 3, 1958.

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard upon the motion of appellants for permission to file the Designation of Contents of Record on Appeal without filing the transcript of proceedings and that they be permitted to file such transcript at a subsequent date, and the Court having read said motion and being fully advised in the premises,

It Is Hereby Ordered that the Designation of Contents of Record on Appeal by appellants be and the same hereby is accepted without the simultaneously filing of the transcript, and

It Is Further Ordered that such transcript may be filed at a subsequent date.

Done in Open Court this 16th day of July, A.D. 1958.

By the Court:

/s/ SAM M. DRIVER,
Judge.

[Endorsed]: Filed July 16, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF THE CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the originals filed in the above cause, as called for in Appellants' Designation filed on July 3, 1958, and as called for in Appellees' Designation filed on July 8, 1958.

Date of Filing	Title of Document
8/29/56	Complaint.
1/22/57	Motion to Make More Definite and Certain (Filed on behalf of Defendants, Swier).
4/30/57	Plaintiffs' Motion to add Party Plaintiff.
6/6/57	Order adding Party Plaintiff.
3/25/57	Answer of Defendants Swier.
6/10/57	Request and Motion for Jury Trial (by Defendants Swier).

- 6/10/57—Application for Leave to Amend Answer of Defendants Swier to Complaint.
- 6/10/57—Answer of Defendants Swier with respect to Additional Party Plaintiff.
- 7/17/57—Objection of Plaintiffs to Request and Motion for Jury Trial.
- 2/13/58—Pre-Trial Order.
- 3/28/58—Plaintiffs' tendered Instructions, Nos. 19, 20 and 21.
- 3/28/58—Verdict of Jury with question attached.
- 3/28/58—Judgment on Jury Verdict.
- 4/4/58—Plaintiffs' Motion to set aside Verdict and Judgment and to enter Judgment for Plaintiffs or, in the alternative for New Trial.
- 4/16/58—Affidavit of Gordon Beck.
- 4/16/58—Affidavit of Homer B. Splawn.
- 4/16/58—Affidavit of Kenneth B. Elledge.
- 4/16/58—Affidavit of Ward M. Francis.
- 4/16/58—Affidavit of Robert Masterman.
- 4/7/58—Affidavit of Vincent A. Noga.
- 4/7/58—Affidavit of Robert Masterman.
- 5/28/58—Order Denying Motion for New Trial, etc.
- 6/16/58—Plaintiffs' Notice of Appeal.
- 6/16/58—Cost Bond on Appeal.
- 7/3/58—Designation of Record.
- 7/3/58—Statement of Points to be Relied Upon.
- 7/3/58—Motion for permission to file Designation of Record without Transcript, Transcript to be filed at later date.
- 7/3/58—Certificate of Mailing Designation, Statement of Points and Motion.

7/16/58—Order allowing Designation to be filed without Transcript.

7/8/58—Appellees' Designation of additional portions of record.

7/16/58—Record of Proceedings at the Trial.
Plaintiffs' Exhibit No. 1—Ladder.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima in said District, this 21st day of July, 1958.

[Seal] STANLEY D. TAYLOR,

Clerk,

/s/ By THOMAS GRANGER,

Deputy Clerk.

In the District Court of the United States, Eastern
District of Washington, Southern Division

Civil No. 1137

ROSE WONG and KENT WONG, husband and
wife, Plaintiffs,

vs.

WALTER SWIER, LAURA SWIER, DR.
JAMES E. ZIMMERMAN, DR. LELAND R.
LUGAR, and YAKIMA VALLEY MEMO-
RIAL HOSPITAL ASSOCIATION,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable Sam M. Driver, Judge,
and a jury.

Date: March 24, 1958. Time: 10:00 o'clock a.m.

Appearances: For the Plaintiffs: George H. Mullins, Attorney at Law, Miller Building, Yakima, Washington. Thomas Hudson, Attorney at Law, 335 Petroleum Club Building, 110 16th Street, Denver 2, Colorado. Alice Loveland, Attorney at Law, 335 Petroleum Club Building, 110 16th Street, Denver 2, Colorado. For the Defendants: Homer B. Splawn, for the Defendants Swier, Attorney at Law, Larson Building, Yakima, Washington. John Gavin, appearing for Gavin, Robinson and Kendrick, for the Defendants Zimmerman and Yakima Valley Memorial Hospital Association, George M. Martin, Attorney at Law, Larson Building, Yakima, Washington; John S. Moore, Attorney at Law, Miller Building, Yakima, Washington. [65]*

* * * * *

WALTER SWIER

the defendant, called and sworn as an adverse witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. Hudson): Will you state your name, please? A. Walter Swier.

Q. And where do you reside, sir?

A. Cowiche.

Q. And what is your employment?

A. I am a fruit grower, self-employed.

Q. Do you have any other employment?

A. Oh, I have got some sidelines. [71]

* Page numbers appearing at bottom of page of Reporter's Transcript of Record.

(Testimony of Walter Swier.)

Q. (By Mr. Hudson): Were you so engaged on October 17, of 1955?

A. I was hauling apples out of the orchard.

Q. I mean, you were operating this fruit ranch at that time? A. Right, yes, sir.

Q. What fruit were you picking at that time?

A. Apples.

Q. Are you acquainted with the plaintiff, Rose Wong? A. Intimately.

Q. And Kent Wong? A. Yes, sir.

Q. How long have you known them?

A. Oh, I have known Rose Wong, I should say, twelve or thirteen years.

Q. And what is the nature of that acquaintanceship?

A. Well, I knew of her years before. Then she was a missionary in China and, well, she came home when there was [73] trouble in Japan with China and she resided on our place for some months in a tenant house before her husband came back from China.

Q. In other words, your acquaintanceship with her was of a religious nature?

A. Somewhat sympathetic, also; she needed a home.

Q. Now, among the admissions that we have here, Mr. Swier, which we do not need to prove is the fact that Rose Wong was in your employ at that time? A. That is right.

Q. And that she was picking apples?

A. Right.

(Testimony of Walter Swier.)

Q. And that she was using the ladder furnished by you in that work? A. Correct.

Q. And that you and Mrs. Swier were under the duty to provide her with a safe ladder and that she fell and broke this leg at the ankle. Now, do you recall, Mr. Swier, who called Dr. Zimmerman?

A. My wife was instructed to call him.

Q. As far as you know, then, Mrs. Swier called him? A. That is right.

Q. I mean, Mrs. Swier called Dr. Zimmerman?

A. Mrs. Swier called Dr. Zimmerman, correct; the office, at least. [74]

Q. Now, do you recall the time that the apple harvest or apple picking commenced?

A. I was going to look that up but I didn't, but we had been picking, oh, perhaps six or eight days.

The Court: I understood that Mrs. Swier was instructed to call Dr. Zimmerman?

A. Correct.

The Court: Do you know by whom she was instructed to call him?

A. Well, we said, "Call a doctor immediately." She says, "I will call him." There was plenty of confusion, your Honor.

The Court: Mrs. Wong didn't tell your wife to call the doctor, did she?

A. Not to my knowledge. I wasn't there.

The Court: It was somebody else suggested to her or instructed your wife to call the doctor, is that right?

(Testimony of Walter Swier.)

A. Well, she might have called herself if she heard of it from the children.

The Court: All right, go ahead. I was just trying to make it clear, was my only purpose in it, was to make it clear for the jury.

Q. (By Mr. Hudson): At least, the instruction to call Dr. Zimmerman did not come from Mrs. Wong, is that correct? A. Sir? [75]

Q. At least, the instruction to call Dr. Zimmerman did not come from the injured lady, Mrs. Wong?

A. Well, I couldn't verify that, sir, because I wasn't there until sometime after it happened. I was on the other side of the place, oh, perhaps a quarter of a mile away.

Q. Now, Mr. Swier, did you make any inspection of your ladders that you used in the harvest that year? A. Yes, sir, all of them.

Q. What kind of inspection did you make?

A. Well, my son works for me and each season before picking we go over all the ladders and we tighten them and see if they were in what we would call a usual condition.

Q. Well, then, you personally did not do that?

A. Oh, yes, my son and I together.

Q. And your statement is that you and your son went over all the ladders and tightened them up and did whatever was necessary?

A. That is right.

Q. Did you make any test of these ladders before they were given to the pickers to use?

(Testimony of Walter Swier.)

A. Yes, sir, anything questionable is discarded.

Q. I didn't understand that.

A. I say, anything we question is discarded.

Q. What would cause you to question the ladder? [76]

A. Well, if there was a loose step or the side come loose, or if there is too much play in the third leg.

Q. You mean in the yoke? A. Sir?

Q. In the yoke of the third leg?

A. Well, you can tell by feeling of the third leg whether there is excessive looseness.

Q. Did you pick out the ladder that was given to Mrs. Wong for use?

A. Well, I didn't pick it out for her, but the ladders were all given to them by me, these four, or four in the family picking.

Q. And had those four been inspected by you?

A. Yes, sir, and by my son.

Q. No, not your son, by you?

A. Yes, I brought them personally, as I recall.

Q. You looked those over yourself?

A. As I recall.

Q. Do you recall having done anything to any one of these four ladders that you gave to the Wongs in the nature of repair, before delivering them?

A. No, I couldn't say that, not when I delivered them, that is true.

Mr. Hudson: Pardon me, a minute.

Q. In testing these ladders, Mr. Swier, did you

(Testimony of Walter Swier.)

make any other tests [77] besides that of swinging the tongue or the third leg, as you call it?

A. Yes, sir, we usually tighten them and climb on them to see if there is any give in the sides. There are adjustments on both sides on the outer edge with burrs to keep the side rigid.

Q. If there is any give, why, you take that up?

A. That is right.

Q. That is about the extent of your inspection?

A. Correct.

Mr. Hudson: I believe that is all at this time, sir.

The Court: Just a minute.

Mr. Splawn: Your Honor, I shall develop the situation much more fully with Mr. Swier in my case in chief and so I will have no questions now.

The Court: Do you have any cross examination?

Cross Examination

Q. (By Mr. Gavin): I might, just for clarification, ask Mr. Swier, your ranch where this accident occurred is located how far from Yakima?

A. Approximately thirteen miles.

Q. Is it in or near the town of Cowiche?

A. Well, it's about southwest, approximately, I don't know [78] what you call the town of Cowiche, there is no town.

Q. It's where the stores are, and whatnot, along the highway near Dr. Zimmerman's office?

A. From the stores, the supermarket, it's about half a mile west and about a quarter mile south.

Q. The reason I asked you this, Mr. Swier, some

(Testimony of Walter Swier.)

of our jurors here may not be familiar with the area, some of them come from the lower valley, your Honor, here; it might be geographically of interest to locate the place where this accident occurred. It is out in a general farming area, an orchard unit, is it not, west of the City of Yakima?

A. That is right.

Q. And are you familiar with where Dr. Zimmerman's office is? A. Yes, sir.

Q. It is near your place and near the supermarket, is that right? It's out in the same general area?

A. Well, if you are speaking of Dr. Zimmerman's office now?

Q. Yes.

A. That is in the same area as the supermarket.

Q. Well, it's roughly also about thirteen miles west of the City of Yakima?

A. That is right, we are about the same distance from the City of Yakima. [79]

Q. Dr. Zimmerman was at this time, and still is, the only doctor right out in that area, right?

A. That is right.

Q. So, if someone out there calls a doctor, or the doctor in the Cowiche area, that is Dr. Zimmerman? A. Correct.

Mr. Gavin: That is all.

Redirect Examination

Q. (By Mr. Hudson): One other question, Mr. Swier. The orchard is the heavy fertilized piece of ground, is it not?

(Testimony of Walter Swier.)

A. Well, now, I would qualify that. That is a comparative statement, a matter of opinion.

Q. Well, let's put it this way: Do you use fertilizer with an orchard? A. Some.

Q. How much do you use to an acre?

A. Well, the last three years I have used no nitrogen at all and I use, oh, about 600 pounds of phosphorus, organic phosphate.

Q. How long has that orchard been in?

A. Oh, it's perhaps thirty years old.

Q. Do you fertilize each year? A. No, sir.

Q. Every other year? [80]

A. Approximately.

Mr. Hudson: I believe that is all at this time.

The Court: Any other questions? That is all, then, for the present.

(Witness excused.)

Mr. Hudson: Call Dr. Zimmerman, please, for cross-examination.

The Court: Yes, all right.

DR. JAMES E. ZIMMERMAN

called and sworn as an adverse witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. Hudson): Would you state your name, please, sir?

A. James Edward Zimmerman.

Q. What is your occupation?

A. I am a physician and surgeon.

(Testimony of Dr. James E. Zimmerman.)

Q. Where do you reside?

A. In Cowiche, Washington.

Q. Pardon me?

A. In Cowiche, Washington.

Q. And where is your medical office?

A. In Cowiche, Washington.

Q. You are acquainted with the plaintiff, Rose Wong?

A. Yes, I am, since the time of her accident; I didn't know [81] her before that time.

Q. Do you know who called you on October 17, 1955, from the Swier ranch?

A. No, I don't. I didn't receive the call personally. My office manager received the call and notified me that someone had called from the Swier ranch.

Q. Who is your office manager?

A. Mrs. Mary Pooler.

Q. Is she still with you, Doctor?

A. No, she hasn't been with me since June of 1957 because of the acquisition of a new member to her family.

Q. Do you know where she resides?

A. She lives on Summit View Extension, which I think is Route 2, Yakima, Washington.

Q. I am a stranger, is that near here?

A. That is approximately halfway between the City of Yakima and Cowiche.

Q. In other words, it isn't very far away?

A. No. No, sir.

Q. Did you go to the Swier ranch?

(Testimony of Dr. James E. Zimmerman.)

A. No, I didn't, I could not leave at the time because I was busy with a patient and when Mrs. Pooler called and said they needed a doctor, I sent my office nurse with some medicine in case it was needed and to evaluate the seriousness of the injury. [S2]

Q. Where did you then see Mrs. Wong?

A. The first time I saw Mrs. Wong was in surgery at Yakima Valley Memorial Hospital. Dr. Lugar had asked me to help him with the surgical part of her case.

Q. Now, you didn't see her until she was in surgery? A. No, sir.

Q. And what was the injury that she had sustained?

A. She suffered a comminuted and compound fracture of the lower third of both bones of her left leg, which would be the tibia and fibula. She had a laceration, an open wound, in the medial part of the inner part of her left leg where the fragments had pierced the skin and muscle in that area.

Q. To put that in the words of the layman and so that I will understand it, possibly the jury would appreciate it, could you get that down into broken bones at a certain location?

A. Well, I am sure most of these gentlemen understand what a compound comminuted fracture is. It's one that is broken in many places and one that protrudes through the skin.

Q. The compound fracture indicates that the bone has come through the flesh and skin?

(Testimony of Dr. James E. Zimmerman.)

A. Yes, sir.

Q. And that was the condition of this lady? [83]

A. That was the condition of this wound.

Mr. Hudson: Do you have any X-rays?

Mr. Gavin: These are the ones that you requested, the hospital produced them.

Clerk of the Court: Which X-rays are these?

Mr. Gavin: These were X-rays that we were requested to produce, the X-rays that were taken or kept at Memorial Hospital. This is an envelope of X-rays that were handed to me by Mr. Hunt, saying that these are X-rays that they have had at the hospital available for use here any time we want them.

Clerk of the Court: We have assigned three different groups of X-rays. I wonder if you can tell me if those are one of those groups?

Mr. Hudson: I am afraid we are going to have to let the doctor do that.

Mr. Gavin: Yes, I am sure they are not Dr. Enlow's X-rays because he would have taken them by his own personal examination. I am sure they are taken by Dr. Lynch. They must be those that are denominated No. 4.

Q. (By Mr. Hudson): Doctor, I am going to hand you several X-ray negatives, if that is what they are called, and have you, if you will be good enough, to sort out the ones which were taken on the day that Mrs. Wong was admitted to the hospital.

A. Well, these X-rays are all numbered at the

(Testimony of Dr. James E. Zimmerman.)

time with a little machine and I don't know if you can see here or not, but it gives the name of the doctor, the name of the hospital, the Yakima Valley Memorial Hospital, the number of the patient that is given when she is admitted, and the doctor's name, in this case Dr. Lugar, and the name of the patient, the date and the part that was taken. I just wanted to explain that to them; and these are all X-rays that were taken while Rose Wong was at Yakima Valley Memorial Hospital. Those were taken on the 17th, but those were what we call post-reduction X-rays.

The Court: Do you want them in chronological order?

A. That is what I am trying to do, your Honor.

The Court: That is right, yes.

A. This is probably the first one, (witness places X-ray in shadow box). It's one of the first ones that was taken on the 17th of October, 1955, which shows a left view. The left indicates the left extremity, and it is of the lower left leg and foot. Can you all see that? In this region you can see an obvious displacement and alteration of these bones. It may be a little hard for some in the back to see them.

Mr. Hudson: Could we move that table closer, would it help in any way? They say they can see them. [85]

A. (Continuing) You have to look at X-rays closely.

(Testimony of Dr. James E. Zimmerman.)

This one has my name on it and 10/17/55.

The Court: Just a moment. It seems to me that it would make a better record here of them if these were marked to show us to what the Doctor is referring. None of them have been marked so far and it would be impossible to determine from the record what he is talking about. Will you hand the clerk the one you just commented on, please, Doctor?

A. This is the first one, your Honor.

The Court: Taken by which doctor?

Mr. Hudson: By Dr. Zimmerman.

Clerk of the Court: Your Honor, that must be a member of group seven, then, the numbers that were reserved for the group taken by Dr. Zimmerman, and I will mark this No. 7-A.

Mr. Gavin: Doctor, I think to prevent any confusion, these are the ones that were taken by Dr. Lynch out at the Memorial Hospital. They are all cataloged on the pretrial order, I understand, as Exhibit 4.

The Court: Well, they should be given sub-designations, letters, or something, to show what the Doctor is talking about.

Mr. Gavin: Well, I think, as Mr. Taylor commented, these were Dr. Zimmerman's X-rays.

Clerk of the Court: I am sorry, I thought that is [86] what I asked the doctor, if it was taken by Dr. Zimmerman?

A. No, my name was on the slip because I requested the X-ray, but these were all taken by

(Testimony of Dr. James E. Zimmerman.)

the radiology department of the Yakima Memorial Hospital.

Clerk of the Court: The pre-trial order shows that those were X-rays taken by Dr. Lynch, is that correct?

Mr. Hudson: Yes, at the request of Dr. Zimmerman.

A. May I explain why my name appears on the first one?

Mr. Hudson: Not at this time.

The Court: No, I think your counsel may bring that out later.

A. All right. This is the first one. This is the film that I made when I admitted her to Memorial Hospital.

Q. (By Mr. Hudson): May we designate that one, Doctor, as being the one that has been under discussion?

A. The one that I just showed you.

(Whereupon, said X-ray was marked as Plaintiff's Exhibit No. 4-A.)

Q. (By Mr. Hudson): And it is designated as?

A. 4-A.

Q. 4-A.

A. Now, the next two were taken after her surgery.

Q. Do you have another one?

A. No, that is the only one that was taken.

Q. Is this the only one that was taken prior to surgery? [87]

(Testimony of Dr. James E. Zimmerman.)

A. This is the only one that was taken prior to surgery.

Q. In other words, 4-A is the only pre-surgery picture?

A. Yes, sir, it's the only one that is here and the only one that I know of. All the X-rays are kept in a common envelope, even for patients that may have been admitted several years before; that way, for filing reasons, they are kept in there. These three were taken the same day.

Mr. Hudson: Let's get them identified.

The Court: Have them marked.

Clerk of the Court: 4-B, 4-C and 4-D.

(Whereupon, said X-rays were marked for identification as Plaintiff's Exhibits Nos. 4-B, 4-C and 4-D, respectively.)

A. (Witness places photograph in shadow box.) These are what we call post-reduction films, or after surgery. It shows the light, very white article, which is a metal plate, and I think if you look closely you can see three metal screws, and this is just another view of the same fracture. This (indicating) is still another view of the same fracture, three views taken at different positions to show us the arrangement of bones after her surgery. We are primarily interested in her tibia, the main bone. These have Dr. Lugar's name on them. [88]

* * * * *

CHAUNCEY W. McDONALD

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. Hudson): Will you state your name, please? A. Chauncey W. McDonald.

Q. Where do you reside?

A. 3410 Fruitvale.

Mr. Hudson: Yakima? Your Honor, would you inquire of the jury if they are hearing everything?

The Court: Can you hear in the back end and the upper corner?

Juror No. 6: Sometimes not too well.

The Court: I see. I usually inform the witnesses, I don't think I have this morning, that the acoustics, that is to say, are very bad in this room. It's a typical courtroom in that respect; it's hard to hear, you have to keep your voice up and speak slowly.

Q. (By Mr. Hudson): I wonder if you would restate your name and where you reside?

A. Chauncey W. McDonald, 3410 Fruitvale, Yakima.

Q. And with whom are you employed?

A. I am with the Department of Labor and Industries as safety inspector, in that capacity.

Q. And how long have you been employed as a safety inspector for the State of Washington?

A. Approximately nine years.

Q. In the course of your work, your safety inspection work, just what is it that you do?

(Testimony of Chauncey W. McDonald.)

A. General safety inspection. It requires the inspection of any hazard in which an employee is involved.

Q. Do you receive any schooling from the State in connection with safety factors?

A. Yes, sir, we do.

Q. How old are you, Mr. McDonald? [98]

A. Forty-eight pretty soon.

Q. What has been your vocation prior to your employment with the State of Washington as safety engineer?

A. I don't understand what you mean by "vocation"?

Q. What do you do for a living?

A. I was a construction man.

Q. And how long were you connected with construction? A. I started way back in 1922.

Q. And were you in construction work continuously up until the time you were employed by the State?

A. With the exception of a year or two in depression times.

Q. What type of construction were you engaged in?

A. Well, anything from house building to any type of commercial or bridge.

Q. During the course of this construction work did you have any occasion to use ladders?

A. Yes, we did.

Q. Did you use them a great deal, or a little?

(Testimony of Chauncey W. McDonald.)

A. I would say whenever needed, which is approximately one-fifth or sixth of the time that you work in construction.

Q. With ladders? A. That is right.

Q. Now, during your work with the State of Washington, have you had any occasion to familiarize yourself with [99] what we refer to as a three-legged ladder? A. Yes, I have.

Q. In the course of your work have you had occasion to, at various times, inspect these three-legged apple-picking ladders? A. I have.

Q. I am going to call your attention to a ladder which is lying here and which, for the purposes of identification, has been marked Plaintiff's Exhibit 1.

Mr. Splawn: I believe that is right.

Q. (By Mr. Hudson): And ask you to come and look at the ladder and tell me if you have ever seen that ladder before?

A. (Witness inspects ladder) Yes, I have.

Q. Where did you see it?

A. At the Dependable Ladder Storage.

Q. When is the first time you saw it?

A. Approximately four or five months ago, the latter part of August or first part of September.

Q. Who asked you to look at it?

A. I believe Mr. George Mullins contacted me to look at it.

Q. And have you seen it more recently?

A. Yes, just a couple of days ago, a couple or three days ago.

(Testimony of Chauncey W. McDonald.)

Q. That was at my request, wasn't it? [100]

A. That is right.

Q. Did you give it a close inspection both times?

A. Yes, I have.

Q. Pursuant to the inspection which you have given it, have you arrived at any conclusion about it? [101]

* * * * *

Q. (By Mr. Hudson): Have you used these picking ladders, such as this ladder which we have in evidence here?

A. Will you say that question over again, please?

Q. Are you familiar with or have you used ladders such as this ladder we have in evidence here? A. Yes, I have. [110]

Q. And you have inspected this ladder not only today but two or three times previously?

A. That is right.

Q. In your opinion is the ladder which we have in evidence marked Plaintiff's Exhibit 1 a reasonably safe ladder to be used in the picking of apples?

Mr. Splawn: If your Honor please, I object to that for the reason that this man hasn't been qualified as being in the apple business in this valley and to know what is commonly used throughout the Yakima Valley, so far as picking ladders are concerned. He, apparently, is an employee of the Department of Labor and Industries, which does

(Testimony of Chauncey W. McDonald.)

not cover the field of agriculture and he has not been qualified thus far to meet the standard.

The Court: I don't think he is testifying as to any particular standard but as to whether this is safe for a human being to use, isn't that correct?

Mr. Hudson: That is correct.

The Court: Overruled.

A. It is not.

Q. (By Mr. Hudson): Can you tell from the witness stand there or by demonstration with the ladder upon what you are basing your opinion that it is not a reasonably safe ladder?

A. I would like to demonstrate with the ladder, if I may? [111]

The Court: All right.

Q. (By Mr. Hudson): Sure.

A. (Witness approaches ladder) When you stand the ladder up (witness raises ladder to vertical position) here, regardless of how you stand it for picking you set it up in here, and as long as your weight is down on this bottom you are riding on these two legs, but the minute that you go over, you see what happens to any ladder, you reach over and your ladder goes at an angle, so naturally it throws your weight with nothing under here at all, and causes it to become weak. That is one of the things that I noticed about this ladder, and while I was facing the jury here on this particular side, if you will notice, there is some cracks up along the side-rail here where that ladder has

(Testimony of Chauncey W. McDonald.)

been in a twist before, and it has cracks, so it isn't even safe to stand on the top step of this particular ladder. You can use it up to approximately here (indicating). You are reasonably safe because you are using your weight on these two legs. If you go beyond that, it is not a safe ladder.

Q. Now, is there a looseness in the top yoke, Mr. McDonald?

A. (Witness swings leg of ladder back and forth) Quite a little bit. There has to be in order to put this in a twist like it went into. [112]

Q. Can you, Mr. McDonald, by having the ladder down and reversing it so the jury can see it, the looseness of the yoke; maybe you had better demonstrate it.

A. (Swings leg back and forth.)

Q. Now, just a minute, Mr. McDonald. What is it that causes all the play in here on each side of the yoke?

A. The holes are wore on the middle.

Q. To a marked degree?

A. Either the holes or the bolts; I didn't take it apart to find out, but there is play in there, more than is needed to run it through. If your holes fit the bolts properly, you wouldn't have that wiggle in it.

Q. The play would not be there?

A. That is right.

Q. Mr. McDonald, is the opinion that you have expressed an opinion which represents your thoughts in the use of this particular ladder in an orchard,

(Testimony of Chauncey W. McDonald.)

that it is unsafe, that it is not reasonably safe to be used in an orchard for apple picking?

Mr. Splawn: I renew this same objection.

The Court: Yes, all right, the record may show your objection. You may answer.

A. I may? Yes, it is considered an unsafe ladder because of the looseness on the top step.

Mr. Hudson: You may examine. [113]

Cross Examination

Q. (By Mr. Splawn): Have you, Mr. McDonald, ever been engaged in the orchard business in the Yakima Valley or anywhere else?

A. Not in the orchard business, no.

Q. In your work for the Department of Labor and Industries, do you cover agriculture?

A. Sometimes.

Q. The law under which you operate, does it apply to agriculture?

A. We have what they call elective adoption, and there is some adoptions that use that particular classification.

Q. Is it your position that the defendants Swier in this particular case are under the Department of Labor and Industries?

Mr. Hudson: If the Court please, I am going to object. This man is not a Court, he is not trying to establish what jurisdiction Mr. Swier is under.

Mr. Splawn: I may go into, as the basis of his opinion, as to whether he is applying certain rules.

(Testimony of Chauncey W. McDonald.)

The Court: Yes, I don't think you can ask him whether the defendant Swier is under the Department of Labor and Industries or not.

Q. (By Mr. Splawn): In other words, you have no set knowledge that they are under a certain set of rules that [114] your job is to inspect and follow through?

A. I might explain it this way, that I got complaints on the particular industry that is operating, that is the only way I know that they are operating, and I go out to make the inspections.

Q. Now, I take it that you have never owned or operated an orchard? A. That is right.

Q. And have you ever been around the valley and in the orchards of the valley to any extent, so as to become familiar with what growers here ordinarily use? A. Yes, I have.

Q. Is it your testimony that ladders such as this are not in common and ordinary use in the orchards of this valley?

The Court: Now, just a moment; do you mean this type of ladder?

Mr. Splawn: This ladder, with its features, everything about it, every feature about it.

Q. Is it your testimony that ladders of this character with the physical aspects to it that this particular ladder has, is not in common or ordinary use of the orchards of this valley?

A. Not in late years, it is not as common as it used to be.

Q. Is it still common, is it your testimony? [115]

(Testimony of Chauncey W. McDonald.)

A. There are still some individuals that use a ladder of that kind, yes, that is right.

Q. Yes. In other words, ladders such as this one are still in common use, are they not, in the Yakima Valley?

A. They are leaving that particular one.

Q. My question was, ladders like this one, and I refer to all of these features, are still in common use in the Yakima Valley in the apple and orchard business?

Mr. Hudson: Just a minute, let's make it clear, do you mean ladders that are in the condition that this one is, with the loose yoke and the split side?

Mr. Splawn: I have tried to make it as plain as I can; all of the features of this ladder.

Q. Is it your testimony that ladders such as this one, with those features, whatever they are, and you have referred to a couple of them, are not in ordinary or common use still in orchards of this valley?

The Court: Just a moment.

Mr. Hudson: If the Court please, that is not his testimony nor was that the testimony on direct examination. The testimony on direct examination was that ladders in the condition of this were not reasonably safe to use in orchards for apple picking. He expressed no opinion as to what all the ladders in the Yakima Valley were or the condition they were in. [116]

The Court: I think I should sustain the objection. If you mean that this general type of ladder

(Testimony of Chauncey W. McDonald.)

The Court: Yes, I think the last remarks should be stricken as to what can be done with a new ladder, that is counsel's testimony.

Q. (By Mr. Splawn): I take it you have never done that? A. No, I haven't.

Q. Would you be surprised that you can take a new ladder and make it go the same way?

The Court: I think that is testimony, Mr. Splawn, that is precisely what I sustained the objection to before. You can ask him, but not tell them, that it can be done.

Q. (By Mr. Splawn): You don't know whether it can be done or not?

A. I never tried it on a new ladder.

Q. You never tried it on a new ladder? I understood from your testimony and I noticed your hand at the time you were talking was up here (indicating)? A. Approximately there. [119]

Q. As long as you are up this far (indicating) this is a reasonably safe ladder?

A. That is a reasonably safe height on that ladder.

Q. So, if Mrs. Wong, for example, were standing on this rung, or anyone else, and the ladder was set properly, you would expect nothing to happen, would you?

A. That is right, because you have got the brace, you are putting your weight on your two legs on the back side there, the same two legs, unless it's in a hole in soft ground.

Q. Do you suppose, Mr. McDonald, there is any

(Testimony of Chauncey W. McDonald.)

risk if weight were applied up there, of this tongue slipping out on this surface?

A. I think it would. Well, maybe not on this surface here, if someone would hold this tongue down at the base in here (indicating).

Q. About how much do you suppose I weigh?

A. Oh, you weigh about 145 pounds.

Q. Now, this ladder is now set properly, is it not? A. I presume it is.

Q. I see. Incidentally, the sides here, are they all tight, do you know? Have you found anything?

A. I think the rungs are all right; I checked them.

Q. The rungs are all right, are they? I see. Incidentally, to your knowledge this ladder has been in storage for [120] at least since last August that you know of? A. That is right.

Q. It has been dry storage, too, hasn't it?

A. That is right.

Q. How long prior to last August this ladder has been in dry storage, you don't know?

A. I don't know, but I do know that moisture in the air like we had last night and the day before will get in and cause tightness on wood.

Q. Well, the times that you have seen this ladder has been out in the open or has it been in a dry storage? A. It was in a dry storage.

Q. It was in a dry storage? Now, as a person climbs this ladder, how does the weight start to shift now, as you climb higher?

(Testimony of Chauncey W. McDonald.)

A. As you climb higher you get more and more up here (indicating), but you don't release your guide down below here until you are up and start putting more weight onto this particular part.

Q. As I climb higher I put more weight on that? A. Yes.

Q. On that?

A. That is what I am doing, because it starts to hold.

Q. I see. I have some boxes of dirt; I am all right so far, okay, reasonably safe (indicating)?

A. If you go much more, that leg is starting to walking already on you. [122]

* * * * *

Q. (By Mr. Splawn): Mr. McDonald, I was interested in your remark that up to the fourth step from the top, when you get to that the ladder is reasonably safe.

A. That is true, because you have two rigid legs which are bearing your weight. The higher you go, the more of a tripod you get into. When you get up there, you have to do the tight-rope act or balancing act, because of the fact that the thing is loose under your feet. Whenever you are standing up on something that is loose under your feet, you have got to be an expert in balance to be able to stay on top of there.

Q. You would say that you would have to be a tight-rope walker in order to stay up there?

A. I didn't say that; similar to a tight-rope

(Testimony of Chauncey W. McDonald.)

walker, but you would have to be an expert balancer. [127]

Q. You would have to be an expert balancer? Now, isn't it a fact the higher you go on that ladder the more weight that you have directly applied to that top up there? A. That is true.

Q. That is true?

A. Yes, that's what putting the pressure onto this particular thing here will do. It's a pretty tough and solid stick but some of them will bow and that loosens the big bolt up there; it will go into a twist. After you go up here (indicating) this particular leg started to walk back on you, showing that you are getting high enough, as a safety factor.

Q. That leg started to walking back?

A. That particular corner leg started to lift and walking back when you were onto this particular step right here, I believe it was, and I started to go to grab it.

Q. Is it your testimony that if you had that ladder out in an orchard on flat ground, let's say, and someone climbed that ladder and got up there, the fourth, third, or second rung from the top, that that ladder would start to doing something?

A. It's possible.

The Court: Pardon me, but I think in common fairness, I think I should instruct the jury to disregard the [128] witness' testimony as to what happened when Mr. Splawn was on the ladder. The reason I am asking them to disregard it is that I

have, for obvious reasons, ruled that we shall not have these demonstrations of somebody getting up at the top of this ladder in the courtroom here. I don't think we can simulate the conditions that were present in the orchard. I don't think it's possible to do that. Since I have ruled out the demonstration, I don't think any part of it should be considered at all. [129]

* * * * *

ROSE WONG

the plaintiff, called and sworn as a witness in her own behalf, testified as follows:

Direct Examination

Q. (By Mr. Hudson): Will you state your name, please? A. Rose Wong.

Q. Will you try and keep your voice up, Mrs. Wong, so that all the jury can hear and we can hear? A. I will.

Q. Where do you reside, Mrs. Wong?

A. At 1207 N.E. Fremont Street, in Portland, Oregon.

Q. What is your now age? A. I am 47.

Q. And your age in October of 1955?

A. Was 45.

Q. What is your occupation, Mrs. Wong?

A. I am a missionary and housewife.

Q. How long have you followed the vocation of being a missionary? A. Twenty-one years.

Q. You are married? A. Yes, I am.

Q. And what is the name of your husband?

A. Kent Wong.

(Testimony of Rose Wong.)

Q. Is he of Chinese origin?

A. Yes, he is.

Q. Do you have any children?

A. Yes, I do, I have five children.

Q. And what are their general ages?

A. They range between the age of 18 and 7.

Q. And their sex?

A. One son and four daughters.

Q. What formal education have you had, Mrs. Wong?

A. I have had grade school, high school, some business college education, and training for missionary work.

Q. Have you had any experience in picking apples?

A. None previous to the time of 1955.

Q. Where were you residing?

A. I was residing in the tenant house on the Swier farm.

Q. Now, Mrs. Wong, it has been stipulated that the following admissions have been made, those are: that you were on October 17, 1955, in the employ of Walter Swier and Laura Swier, and as such an employee used a ladder which was furnished by the defendants, that is Walter Swier and Laura Swier; and that the defendants Walter [139] Swier and Laura Swier were under the duty to furnish you with a safe ladder; that you received or sustained injuries by reason of the fall from this particular ladder in the course of your employment; that the defendant, James E. Zimmerman, was contacted

(Testimony of Rose Wong.)

with reference to your treatment and care; that you were taken to and admitted to the Yakima Valley Memorial Hospital in Yakima, Washington, which hospital was operated by the defendant Yakima Valley Memorial Hospital Association; that while you were a patient in this hospital that gas gangrene developed; that the medical bill of Dr. James E. Zimmerman is unpaid and that the bill was not rendered until June 9, 1957, and that the hospital bill rendered to you by the Yakima Valley Memorial Hospital is unpaid. Those are items which are admitted and will not have to be established otherwise. (Q.) Did you call Dr. Zimmerman, Mrs. Wong? A. No, I did not.

Q. Do you know who called Dr. Zimmerman?

A. Yes, I do.

Q. How do you know?

A. The party told me so themselves.

Q. Who is the party that you refer to?

A. Mrs. Swier.

Q. Mrs. Swier advised you that she had called Dr. Zimmerman? A. Yes, she did. [140]

Q. Had you requested her to call Dr. Zimmerman? A. No, I had not.

Q. Now, the injury that you received is the injury that was described by Dr. Zimmerman on the stand yesterday, is that not correct?

A. Yes, it is.

Q. Can you tell me what took place upon your arrival at the Memorial Valley, Yakima Valley Memorial Hospital, on October 17, 1955?

(Testimony of Rose Wong.)

A. I was taken on the stretcher into the emergency room or department of the hospital. I was placed on the X-ray table, given a shot of morphine. They took X-rays, by "they" I mean the nurses who received me at the door, and subsequently was put on another stretcher.

Q. Were you given any anesthetics at that time?

A. No, I was not. I was given a shot of morphine, was all.

Q. Now, what happened subsequently?

A. I was taken to surgery.

Q. And what occurred there, if you recall?

A. Nurses and an orderly received me into the surgery, I was put on the operating table, the pins and combs were taken out of my hair; they removed the clothing from the upper portion of my body and stated to me that they would give me a spinal injection. Dr. Zimmerman stood to my left, slightly to the rear. He asked [141] if I was in good health or had had any serious illness and my reply was "No." After that the injection was given and the lower part of my body became numb. Then I was turned back onto the operating table, flat on my back, and my arms stretched out in this manner (indicating). They began to then remove my slacks and socks and an anesthetist prepared my arm for an injection of anesthesia. I remember counting to 42 and lost consciousness.

Q. Do you know whether or not you were given tetanus anti-toxin at that time?

A. I was not.

(Testimony of Rose Wong.)

Mr. Gavin: I object to the answer as not responsive, your Honor. He asked whether she knew or not.

The Court: Yes, I think you should answer whether you know or not.

A. To my knowledge I was not.

Mr. Gavin: Well, that still doesn't answer it, your Honor.

The Court: Well, I assume that you inferred while she was conscious?

Mr. Hudson: Yes, sir.

The Court: It will be so understood.

Q. (By Mr. Hudson): The question is, do you know whether you were given any tetanus antitoxin? [142]

A. I know I was not given any.

Q. Well, you know? A. I know.

Q. Now, the question is, were you given a tetanus antitoxin shot? A. I was not.

Mr. Gavin: Well, of course, again I object. She just said she became unconscious.

The Court: Well, so far as you know, you were not while you were conscious, is that your answer?

A. Yes, sir.

The Court: All right.

Q. (By Mr. Hudson): Now, while you were conscious in this particular operating room or at any time there on the 17th of October, 1955, do you know whether you did or did not receive a gas gangrene antitoxin shot?

Mr. Gavin: I object to that. He asks her if she

(Testimony of Rose Wong.)

knows at any time while she was conscious or otherwise.

The Court: I understood the question to be while she was conscious in the operating room, or any other time, if "any other time" referred to the operating room.

Mr. Hudson: I assume that without knowing while she was unconscious from an anesthetic she would not know what was done.

The Court: I don't think we need to quibble about [143] this. These men are reasonable men, they know she couldn't tell when she was unconscious what she was given.

Q. (By Mr. Hudson): Do you know whether you were or not?

A. I do not know what I was given.

Q. Now, were you given on October 17, 1955, a gas gangrene antitoxin shot? A. I was not.

Q. And following the anesthesia, the operation which was described by Dr. Zimmerman was performed, is that correct?

A. It was performed, yes, sir.

Mr. Gavin: I object to the answer "performed," your Honor. The operation was performed by Dr. Zimmerman; she wouldn't know that.

The Court: Well, just what was the last question and answer?

(Last question and answer read.)

The Court: She didn't testify that it was performed by Dr. Zimmerman.

Q. (By Mr. Hudson): Can you describe what

(Testimony of Rose Wong.)

your condition was in the hospital during the next week following the operation?

A. Yes, if you will permit me to put on my glasses to check a few notes I myself have made. During the following week I constantly felt pain that is quite [144] indescribable in any language that I can think of or use. About the second day my leg had swollen until the cast became very painful and tight. I complained of that and the cast was split and I shall say here that the cast reached from below my knee to the joint in my big toe. It was split, then, down the center in the hopes that would give me relief, but the leg continued to swell and continued to become so painful that I could not endure it, so I continually asked for help. Toward the end of the week the upper part of my leg, from my knee to my hip, became swollen and blotchy in color, reddish-purple blotches. It was very swollen, to such a degree that I was not able, of myself, to turn my body over. During that week there was a condition in the room that drew large green blowflies, which continually lighted upon the cast at any moment that it was not covered. I was feverish continually, and many times would push the covering that was on the hospital bed away from my body, and when I did the blowflies would gather upon the cast, and I grew very apprehensive about it and as many times as I could I would pull the sheet to the best of my ability or have someone pull it over the cast in order to protect it from the blowflies.

During the week, the forepart of the week, I was

(Testimony of Rose Wong.)

[145] put in a wheelchair and I became violently ill. While yet in my bed I had a perspiration that is not common. It was oily and foul-smelling, and it would come out on my forehead and run down my cheeks and was on my hands. When they put me into the wheelchair that day I became very ill and the perspiration became quite excessive.

I managed to remain in the wheelchair until they came to relieve me and put me back into my bed. Subsequently, the next day, they tried to put me in the wheelchair again, and I refused, stating to them clearly how deathly ill I had become.

Mr. Gavin: Your Honor, I don't want to interrupt, but she keeps saying "them." It is of some importance to identify who she is talking about, at least to me.

The Court: Yes, I think that should be specified.

A. Thank you, sir.

Mr. Gavin: And if she knows who they are by name, I would like to know that.

A. I am speaking of the attendants, the nurses who attended me.

The Court: You don't know their names, I presume?

A. No, I am not acquainted.

The Court: All right.

A. (Continuing): So, those two days they refrained from putting me in the wheelchair. Come the latter part of [146] the week, they insisted, the nurses insisted, against all my protests, that I must

(Testimony of Rose Wong.)

be put in the wheelchair. The nurses called the orderly and I was put into the wheelchair and wheeled out of my room to the end of the hall and left unattended. I became very, very ill and I gripped the arm of the chair in this manner (indicating), in order not to pitch forward, and searched to the best of my ability to see if I could find a nurse who would come and wheel me back. I could find no one. I sat there for a few minutes and knew then that if I could not be put back to bed I would either faint or fall from my chair, and with all the strength I had I turned the chair and wheeled myself to the door of my room.

When I arrived there an orderly came by and I told him of my condition and showed him that I was wringing wet with this oily perspiration, and explained to him I had become so terribly ill.

Q. (By Mr. Hudson): Will you pause for just a moment, Mrs. Wong?

Might counsel approach the bench?

(Whereupon, counsel approached the bench.)

Mr. Gavin: Dr. Zimmerman is required to be up at the hospital on an important matter at eleven, on some kind of surgery, and counsel assured me this morning that he felt [147] that this witness, plus any cross examination that might be had, would continue for our morning session, or would not require the presence of the doctor or that he be on the stand or produce any records. We want him to remain, but he has to go up there and we would

(Testimony of Rose Wong.)

like to ask him to be excused until after lunch, if the Court has no objection.

The Court: Yes. Will this testimony involve him?

Mr. Hudson: No, it won't involve the doctor.

The Court: Until noon? I have no objection, he may be excused.

Mr. Gavin: I didn't want him to just get up and leave, and I wonder if the Court would say that he may be excused?

The Court: Until the afternoon session?

(Whereupon, the proceedings were resumed in open court within the hearing and presence of the jury.)

The Court: I am informed that Dr. Zimmerman has an urgent professional call and he may be excused until one-thirty this afternoon.

All right, proceed.

Q. (By Mr. Hudson): You may proceed.

A. Your Honor, may I call for the last question?

The Court: Perhaps if you ask for another question it might help here. I think she was describing her experience in the hospital. Do you wish her to continue with that? [148]

Q. (By Mr. Hudson): Yes, sir. Would you continue your explanation of what occurred the week immediately following October 17, 1955, and I believe at the time of interruption you were referring to the wheelchair incident.

A. The attendants, the orderly and the nurses

(Testimony of Rose Wong.)

then wheeled me on into the room and put me back on my bed. During that first week my leg was so painful and, as I had explained, had become so swollen to the hip that I was unable to move my body, but the nurses who attended me each time I rang the bell, would bring to me a bedpan, which is used for ordinary patients in the hospital. That bedpan is from four to six inches thick. They would very roughly shove that thick bedpan under me and I would cry out with the pain of it, but I was never given a fracture pan to use.

On one occasion, especially, I remember ringing the bell for assistance with the bedpan. The nurse came and I asked her for the bedpan. I had been given an intravenous feeding. Intravenous feedings react on the kidneys.

Mr. Gavin: Well, now, your Honor, I don't think she is telling what happened. She is giving some sort of an opinion about intravenous feedings.

The Court: Yes, I think that might be objectionable. [149] You should confine it to your own personal experience and what you felt about it, what you experienced.

A. (Continuing): After the intravenous feeding I had to call often for the bedpan. On one occasion they came in, the nurses came in, snatched the bedpan from the small, I guess you would call it commode, that sits by the bed, shoved it roughly halfway under me, and departed. By that time I was weeping, but I managed to push the bedpan

(Testimony of Rose Wong.)

under a little farther in order to not stain my bed. However, I was not successful. I rang for the removal of the bedpan but I received no service. The lapse of time was at least a half an hour. I, finally, by my strength, pulled the bedpan out from under my back in order to relieve the excruciating pain and subsequently spilled the contents.

When the nurses arrived they made it plain to me by actions, they were very rude and disgusted that my bed had become wet. They stretched a new draw sheet which goes across the bed underneath me.

After that experience, in my pain and nervous condition, I became afraid to ring the bell and would wait as long as possible in calling service. On several occasions when my bed was wet I pushed towels underneath me to avoid calling for service of the nurses.

During that week, toward the end of the week, my [150] back became so painful and the back of my neck, that by the end of the week I was drawn backwards, this causing such discomfort that I refused to let them give me any back rubs before being put to sleep at night, and I asked the nurses if I might have a foam pillow to sleep on.

In conclusion, may I say to the jury that the first week——

The Court: (Interposing) Just a moment.

Mr. Gavin: This is not testimony. She is now making an argument. I think the question and an-

(Testimony of Rose Wong.)

swer method would move us ahead much more rapidly.

The Court: Yes, I think so. The purpose now is to have the witness state the relevant facts concerning her experience in the hospital. All right.

Q. (By Mr. Hudson): During this week's period, were you given drugs for relief of pain?

A. Yes, I was.

Q. Now, what occurred, if you recall, on October 24, 1957, I mean '55.

A. On the morning of October 24 breakfast was not given me and I was prepared for surgery. They bound my head in a white cloth and put me upon a stretcher.

Q. Were you then taken to surgery?

A. I was. [151]

Q. Who was in surgery, if you recall?

A. Dr. Lugar, nurses and an orderly.

Q. And what was done at that time?

A. I was received in the operating room by the nurses and orderly. I was put upon the operating table. The doctor pried off the cast with his hands, during which time I cried with pain. When the cast was pried off they x-rayed the limb, then the doctor removed the sutures. After removing the sutures he discovered a condition in the leg that caused him to squeeze it twice. When he squeezed it, it exploded with blood and pus, and I cried out, "This is murder." The orderly pushed with some force on my shoulders because I had leaned up in an effort to save myself some of the pain, and he pushed me

(Testimony of Rose Wong.)

back on the table. The anesthetist tried to get a needle in my arm but was unsuccessful, and then they put a mask over my face and I grew unconscious.

Q. And there was some operation performed at that time? A. Yes, there was.

Q. Now, on that particular day, October 24, 1955, do you know or, rather, were you given anti-toxin for gas gangrene?

A. Would counsel state the time again, the date?

Q. On October 24, 1955, were you given anti-toxin for gas gangrene? [152]

Mr. Gavin: Your Honor, I am going to object to this question until we establish what this woman knows about gas gangrene antitoxin, how she knows whether it was given or not given. She has expressed no professional qualifications to answer the question.

Mr. Hudson: Possibly I can clear that up a little bit.

Q. On October 24, 1955, were you advised by anyone in the Yakima Valley Memorial Hospital that you were being given antitoxin for gas gangrene? A. I was.

Q. Do you recall who advised you?

A. A nurse.

Q. Do you recall her name?

A. No, I do not.

Q. Will you state what the nurse advised you?

A. She advised me first that they were taking a skin test. After they took the skin test they brought

(Testimony of Rose Wong.)

a large syringe and said, "Mrs. Wong, this is anti gas gangrene toxin," and they gave me the contents.

Q. Were you given, if you know, any other anti-toxin on October 24, 1955? A. No, I was not.

Q. That is, as far as you know?

A. That is right. [153]

The Court: I suppose it could be inferred, but is it your testimony that what they told you was gas gangrene antitoxin was given you intravenously?

A. No, sir, it was given me by a syringe.

The Court: All right, by a needle injection? All right, go ahead.

Mr. Gavin: May I inquire when this was.

The Court: When was that, Mrs. Wong, the 24th of October?

A. The evening, it must have been late evening.

The Court: Of October 24?

A. Yes, sir.

The Court: All right, go ahead, counsel.

Q. (By Mr. Hudson): Subsequent to this operation you returned to your room?

A. No, I did not.

Q. What occurred?

A. They put me in isolation.

Q. And what occurred then?

A. I was in isolation for the next week.

Q. Receiving treatment? A. Yes, sir.

Q. And what was the condition of your leg during the week subsequent to October 24, 1955?

A. It was very painful and to such a degree that

(Testimony of Rose Wong.)

I did not [154] sleep over 15 minutes at a time.
Sir?

Q. That was during the week following October 24, 1955?

A. That is right. It was bandaged heavily and propped (indicating) quite high on the bed.

Q. Yes.

A. It was split open and drains had been put into the leg.

Q. Did you at that time, which is, now we are in the week following October 24, 1955, did you at that time or at any time make any request of Dr. Zimmerman concerning Dr. Lugar?

A. I did.

Q. What was that request?

A. I requested that he not have Dr. Lugar attend me any further.

Q. Was that request made during the week following October 24, 1955? A. Yes.

Q. Did you have further surgery while you were in the Memorial, or the Yakima Valley Memorial Hospital? A. Yes, I did.

Q. Do you recall the date of that surgery?

A. November 15.

Q. Do you know who performed that surgery?

A. No, I do not.

Q. Who did you think performed the surgery?

A. Dr. Brundage.

The Court: What was that name?

Mr. Hudson: Brundage. (Q.) You, of your

(Testimony of Rose Wong.)

own personal knowledge, don't know whether Dr. Brundage did that surgery or not?

A. No, I do not.

Q. But, in any event, there was surgery performed on November 15 of 1955? A. Yes, sir.

Q. Do you know what was done at that time?

A. They cut out the rest of the rotting flesh and put a cast to the upper calf and knee of my leg to the tip of my toes. They also cut a window in that cast.

Q. What was the window in there for, do you know? A. For the dressing of the wound.

Q. Drainage purposes? A. Yes, sir.

Q. How long did you remain in the hospital at that time? A. Until December 13, 1955.

Q. And then where did you go?

A. I returned to my home.

Q. Did you have any subsequent surgery?

A. Yes, I have.

Q. Can you tell me when that was?

A. On two occasions. One was December 13, 1956, and the [156] other in May, 1957.

Q. Now, where was the surgery performed in 1956? A. At St. Elizabeth's Hospital.

Q. Do you know who did that surgery?

A. Yes, I do.

Q. Who was it? A. Dr. Bocek.

The Court: St. Elizabeth's here in Yakima?

A. Yes.

Q. (By Mr. Hudson): Do you know what that surgery consisted of, of your own knowledge?

(Testimony of Rose Wong.)

A. Yes, I do, I was told.

Q. And what was done at that time?

A. The first time?

Q. In December of 1956.

A. Yes, the wound—

Mr. Gavin: (Interposing) Do I understand that this is something she was told or she is going to describe what was done? I didn't quite understand that.

The Court: I think she said she was told what it was, yes. I think that her testimony should be confined to her own knowledge and observation.

Q. (By Mr. Hudson): Can you state from your own knowledge and your observation what was done during the operation in December, 1956?

A. Yes, sir. The old wounds which had continued to drain [157] had been scraped and a long drain had been put in there. The ankle on the same leg had also been opened and scraped. It had broken open, running green pus for several months, and they had cut an incision to scrape the bone on that side. A drain was put in and below the drain about three stitches were put in.

Q. You say Dr. Bocek performed that operation?

A. Yes, sir.

The Court: Who is that doctor?

Mr. Hudson: Dr. Bocek.

The Court: Oh, Bocek?

Q. (By Mr. Hudson): He maintains his office here in Yakima?

A. Yes, he does.

(Testimony of Rose Wong.)

Q. Now, you also stated that there was a third operation in May of 1957? A. Yes, sir.

Q. Where was that operation performed?

A. Also at St. Elizabeth's Hospital of Yakima.

Q. And who performed that operation?

A. Dr. Bocek.

Q. And of your own personal knowledge can you tell what that operation consisted of?

A. Yes, sir, it consisted of scraping a large hole in the original wound on my ankle. That was about that big around (indicating) and the gauze was stuck in there as a [158] drain to keep the wound open.

Q. Now, when you say "That big around," would that be an inch in diameter, or an inch and a half, or two inches, how big?

A. A good inch and a half.

Q. In diameter?

A. Yes, sir, it was more of a circle and it was an inch and a half, at least.

Q. Yes. What treatment, if any, have you received since May of 1957?

A. I have received the continuous attention of Dr. Bocek in changing of the drains in the beginning, and then his constant attention of the wound which continued to drain until February, 1958.

Q. It is no longer draining?

A. It healed in the middle of February. [159]

* * * * *

Q. (By Mr. Hudson): What is the present condition of your ankle, Mrs. Wong?

(Testimony of Rose Wong.)

A. The present condition of my ankle is that it remains very painful. It is impossible for me to walk normally. I use a cane to alleviate the weight in order to alleviate the pain of walking. It is stiff, so that I can neither go up nor downstairs, except one step at a time, and with the support of a railing such as is on stairways. It is shortened.

Q. Pardon me? A. It is shortened.

Q. Are you able to do your normal housework?

A. No, I am not.

Q. Are you able to give your family the normal care? A. No, sir.

Q. How far can you walk on that leg?

A. Exerting my strength, I can walk a block.

Q. You could not accompany your family on an excursion or [165] trip? A. Oh, no, sir.

Q. Now, going back to October 17, 1955, there have been certain admissions made which I have read to you, and you were picking apples for Swiers, I suppose? A. Yes, sir.

Q. And you were using a ladder provided by the Swiers? A. Yes.

Q. Now, will you describe in your own words what took place on the morning of October 17, 1955, while picking apples for the Swiers, in the use of the ladder, which is Plaintiff's Exhibit 1?

A. The accident occurred on that morning after we had been in the orchard over an hour. I had climbed the ladder after I had set it carefully, testing it on both sides to see that it was well-balanced, and had ascended to the second rung from the top

(Testimony of Rose Wong.)

and picked the apples within reach and had turned, the apples were to the left. I turned my body slightly to the right in order that the bag which was then about full of apples would not hit on the ladder, and as I turned my body there was a quick give of the ladder. It went out from under my feet. I made a grab for a limb but could not hang on, and I fell.

Q. You were preparing to go down the ladder?

A. Yes, sir.

Q. Do you have any independent record as to how many times Dr. Zimmerman called on you while you were in the hospital?

A. No, only that I know he came each day.

Q. The doctor called on you each day in the hospital? A. Yes, sir.

Q. How often did you see Dr. Zimmerman after you left the hospital?

A. Upon the day that I left I was instructed by Dr. Zimmerman to call at his office in Cowiche within a week's time. I did this. He dressed the wound and told me to return about in three weeks. That I did. Thereafter until April 26 I saw Dr. Zimmerman on the average of three or four weeks between calls.

Q. Yes, that was April of 19—, what year?

A. 1956.

Q. In April of 1956 was there a longer period between visits?

A. No, sir, subsequent to April 26 there were

(Testimony of Rose Wong.)

two weeks that I saw the doctor every other day or every three days.

Q. And then how long was it between visits?

A. Then I continued with my monthly calls.

Q. Do you recall the last date that you saw Dr. Zimmerman, [167] roughly? A. April.

Q. Of what year? A. 1957.

Q. I wonder if you would come down from the witness stand in close proximity to the jury and turn so that they may see the scar on your leg?

A. (Witness leaves the stand and approaches the jury box.) I wonder if they can see.

Q. Wait a minute, I will give you a little help.

A. (Witness displays scar on leg.)

Q. Just go up here so that these men at the other end of the jury box can see.

A. (Witness displays scar on left leg.)

Q. Will you turn so that counsel can see?

A. (Witness displays left leg to counsel.)

Q. Will you resume the stand, please. Did all members of the jury see the scar?

(Witness resumes the stand.) [168]

* * * * *

Q. (By Mr. Hudson): Mrs. Wong, have you incurred any other obligations on which you have not received statements or bills in connection with this accident? A. Yes, I have.

Q. Can you state to whom those obligations would be due?

A. I have an obligation due Dr. Noall, of Port-

(Testimony of Rose Wong.)

land, Oregon. I have made miscellaneous purchases myself, incurring expense.

Q. Has Dr. Noall rendered you a bill?

A. Yes, he has.

Q. Where is that statement?

A. It must be in Portland, Oregon, in my stationery box.

Q. At least you don't have it with you?

A. No, sir.

Q. Do you recall the amount of the bill?

A. Yes, I do.

Q. How much is it?

A. Twenty-five dollars.

Q. Twenty-five? Do you recall the amount of your miscellaneous expenditures?

A. They approximately amount to \$150.

Mr. Gavin: Your Honor, "Miscellaneous expenditures," doesn't mean very much. [174]

The Court: No, I think they should be specified as to what they cover.

Q. (By Mr. Hudson): Is it possible for you to specify, that is, to itemize what you term "Miscellaneous expenses"?

A. Yes, generally it is.

Q. Let's try.

A. I have expended moneys for built-up shoes, in order that I might maintain a balance when I walk. I made an expenditure for a brace of \$30, which I wore some time. I have made many expenditures for various drugs, some for gauze, peroxide, pain killers, headache pills, which come in the cate-

(Testimony of Rose Wong.)

gory, when I get overwrought with pain it causes my head to throb; vaseline, bandages; that is the general expense.

Mr. Hudson: If the Court please, do you feel that is descriptive enough?

The Court: Well, in the absence of objection, I would say so.

Mr. Gavin: Well, it's a little difficult, your Honor. She has submitted a bill, I notice there, for drugs that somebody just showed me there, for a considerable amount. I presume it's the same thing she is talking about?

Mr. Hudson: No, those are drugs incurred here in Yakima at the hospital, but it is not possible at this time [175] to itemize those, and with the permission of the court we will withdraw that item.

The Court: Very well.

Q. (By Mr. Hudson): Now, you have incurred an obligation to Dr. Bocek of this city, have you not? A. Yes, I have.

Q. Have you received a statement from the doctor yet? A. Yes, I did.

Q. Where is that statement?

A. That statement was destroyed after I paid it.

Q. Do you know how much that statement was that was paid? A. Yes, I do.

Q. What was it? A. \$105.

Q. And the services of Dr. Bocek are continuing? A. Yes, sir.

Q. Have you been able to do any work since this accident? A. No, sir.

(Testimony of Rose Wong.)

Q. What were your earnings from your missionary work?

A. They would average \$350 a month. [176]

* * * * *

Q. (By Mr. Hudson): Subsequent to the accident which you [177] have described as occurring on October 17, 1955, did you ever have any conversations with Mrs. Swier, one of the defendants in this case, relative to this ladder?

A. Yes, I did.

Q. Can you identify the time?

A. Between three and four weeks after entering the hospital.

Q. Can you identify the place? A. Yes.

Q. The hospital? A. Yes, sir.

Q. And who was there?

A. Mrs. Swier and myself.

Q. Anyone else? A. No, sir.

Q. Will you state to the best of your recollection what that conversation was relative to this ladder?

A. Yes, sir. Mrs. Swier had come to visit me; it was in the morning. We were visiting when a gentleman entered the room. He desired a statement. The statement was made and I signed it and the gentleman left, after which, when he had closed the door, Mrs. Swier said, "Oh, Rose, I wish you hadn't signed that, there was something wrong with the ladder."

Q. Was there any further conversation had about it at that time? [178]

(Testimony of Rose Wong.)

A. Yes, she said it was loose, that it made it go this way (indicating).

Q. By the motion you have just made it would indicate a twist? A. Yes.

Q. Did you ever have any conversation with Mr. Swier concerning this ladder?

A. Yes, I did.

Q. Can you identify the time?

A. It was after I returned to my home from the hospital.

Q. That would be subsequent to December of 1955? A. That is right.

Q. But can you fix the time more closely?

A. I should say in the forepart of January.

Q. Where did this conversation take place?

A. At our home on the Swier ranch.

Q. And who was present?

A. Mr. Wong, my husband, who is my husband, myself, and Mr. Swier.

Q. And what was said at that time about it?

A. Mr. Swier knocked on the door and stated he had come to take Mr. Wong to look at the ladder. Mr. Wong put on his coat and went with Mr. Swier out; in a few minutes they both returned, at which time I was sitting beside the small table on which we dined. Mr. Swier [179] and Mr. Wong came in and sat down both around the table. Mr. Swier picked up a piece of paper, which was a sales ad that grocery stores put out, and it is printed on one side and blank on the other. He turned it over and

(Testimony of Rose Wong.)

he diagrammed roughly the place on the ladder which he said was defective.

Q. Where was that place on the ladder?

A. It was at the yoke.

Q. Did you ever employ Dr. Lugar to do anything for you? A. No, sir. [180]

* * * * *

Cross Examination

Q. (By Mr. Splawn): All right, thank you. I understand, Mrs. Wong, that you have been acquainted with Mr. and Mrs. Swier for quite a period of time? A. Yes, I have.

Q. And I further understand that that largely has been through missionary work?

A. Yes, sir. [182]

Q. You have been or you were actively engaged in the missionary field, I take it?

A. I was.

Q. And prior to the accident you were able to earn \$350 a month being a missionary?

A. Yes, sir, my income was an average of \$350 a month.

Q. Now, this accident happened on October 17, 1955. How long had you been at the Swier place by that date?

A. We came to the Swier ranch in the forepart of June.

Q. 1955? A. Yes, sir.

Q. And was the reason for coming to the Swier place to find work in order to support yourself?

A. In order to augment our income, yes, sir.

(Testimony of Rose Wong.)

Q. At that time you were not, or during that period of time from the latter part of June, 1955, to the date of the accident, you were not actively engaged in the missionary field, were you?

A. I beg your pardon, I was, you know.

(Last question read.)

A. That is right.

Q. (By Mr. Splawn): So at least during that period of time I assume, Mrs. Wong, that you were not earning \$350 a month.

A. Personally, I was not at that time. [183]

Q. And what you were doing, or you and your husband, or your husband, was farm chores provided by Mr. Swier for you folks to do so as to sustain yourselves and your children?

A. No, I did no farm chores.

Q. Your husband did, I take it?

A. No, I think he did not.

Q. I see. Well, then, you just lived on the Swier place without doing anything that summer on the Swier place?

A. No, sir, he was hired to do specific work.

Q. Well, something to do with the farm?

A. Yes, sir.

Q. I see. And that was the family's income, I take it, for that period of time?

A. That was part of it.

Q. Yes. Had some other part of your family, and by that I refer to some of your children, had the Swiers been taking care of them for quite a

(Testimony of Rose Wong.)

period before you folks arrived there in the latter part of June, 1955?

A. My three children had their home with the Swiers for about eight months, yes, sir.

Q. Yes, and that was before you and Mr. Wong came with the rest of the family?

A. That is right.

Q. And the Swiers were looking after the children, were [184] they not, and taking care of them?

A. Yes, sir, they were.

Q. And they were doing that, of course, without any compensation from you folks?

A. No, sir.

Q. What is that? A. No, sir.

Q. You mean to say you were paying the Swiers for the care of the three older children for the eight months that they were there before you arrived and Mr. Wong arrived with the rest of the family?

A. I, myself, sent them \$60, and we were to go to the foreign field and part of our contract was that moneys be sent to the Swiers to recompense them for the care of our children.

Q. How much did you pay the Swiers or have to pay the Swiers, then, for the care of the three older children for the eight months time before you folks arrived there?

A. The Swiers, themselves, asked for \$60 a month for clothing and incidentals.

The Court: Really, counsel, is that material as to whether the Swiers were liable for this injury?

Mr. Splawn: Not for that purpose.

(Testimony of Rose Wong.)

The Court: I know what the purpose is, but I think [185] it has gone far enough.

Q. (By Mr. Splawn): Now, I take it then, during the period of time prior to coming to the Swier ranch there, to work there, or your husband to work there, that you were actively engaged in the missionary field, were you?

A. I was actively engaged in missionary work, religious work.

Q. And you were earning the compensation up to that time that you testified you were earning?

A. Yes, sir.

Q. Now, while you were at the Swier ranch did you earn that kind of compensation?

A. Did I earn that kind of compensation?

Q. Yes. A. No, I, personally, did not.

Q. I see. Were you there by any chance during any harvest of any fruit that summer and before apple picking began in the fall?

A. My husband and I worked in the pears, yes, sir.

Q. Was there any work done in the cherries, for example?

A. My husband worked in the cherries, I did not.

Q. I see. Did you have anything to do with the cherry harvest on the place?

A. No, sir. [186]

Q. Oh, incidentally, had you been raised on a farm?

A. My girlhood was spent on a farm.

(Testimony of Rose Wong.)

Q. I see. Now, you mentioned something about pears; did you pick any pears for Mr. Swier that late summer or early fall? A. Yes, I did.

Q. And about how long did that last, the pear picking? A. Picked about a week.

Q. And you worked every day, did you?

A. I worked every day for a week.

Q. I see. And did you use a ladder?

A. Yes, sir.

Q. Did you pick separately from your husband or did you work with him on individual trees?

A. I worked with my husband.

Q. Did you take a row, for example, by yourself, and handle a pear row, for example, on your own without your husband being with you and working with you? A. No, sir.

Q. You had a ladder? A. Yes, sir.

Q. Did you handle the ladder or did your husband? A. I handled the ladder.

Q. And when you were going to pick a pear tree, did you set your ladder? [187]

A. Yes, sir, I did.

Q. And when you were picking around the tree, did you move your ladder around the tree?

A. Yes, I did.

Q. And when you moved to another tree, for example, did you yourself move your own ladder?

A. Sometimes.

Q. And so far as setting of the ladder is concerned during the pear picking time, did you always set your own ladder? A. Most of the time.

(Testimony of Rose Wong.)

Q. I see. Did you understand then about the setting of a ladder or about the use of a ladder?

A. Yes, sir.

Q. There was no need for anyone to educate you or teach you how to set a ladder, you already knew?

A. I learned from observing, sir.

Q. I see. And in the setting of a ladder you have learned to set it properly and carefully?

A. Yes, sir.

Q. And you were aware of that by the time that pear picking came along that fall, were you, how to use a ladder and how to set it? Had you learned to do that by that time?

A. No, sir, I had done no picking previous to that. [188]

The Court: You mean by the time the apple trees came along? You said "the time pear picking," you meant apple picking?

Q. (By Mr. Splawn): By the time the pear picking came along, had you learned during the pear picking or prior to pear picking?

A. I learned during the pear picking.

The Court: You had no experience prior to pear picking? A. No, sir.

Q. (By Mr. Splawn): And by the time the pear picking came along had you learned to use and set a ladder? A. Yes, sir.

Q. So, as has been suggested, by the time apple picking came long you had learned to use and set ladders?

A. I could manipulate it, I could set it.

(Testimony of Rose Wong.)

Q. I see, without any edification or assistance, I assume?

A. Unless the grass was unduly long.

Q. Now, the pear picking that you did, was that on the Swier place? A. Yes, sir.

Q. And after the pear picking did you then start to pick apples for Mr. Swier?

A. There was a period between.

Q. I see. As best you recollect, when did that apple [189] picking commence?

A. The first part of October.

Q. Would you say it was in, I am trying to pin it down, as best you can, it would be about the first week in October?

A. Either the last of the first week or the first of the second week, yes, sir.

Q. Did you pick continuously, then, from the beginning of apple picking to the date of the accident? A. Yes, sir.

Q. And you worked every day, I assume?

A. Yes.

Q. And during that apple picking season about how many hours each day, if you can state, did you pick apples?

A. I would be going out to the orchard about 8:00 o'clock in the morning after the children had left for school, and I would remain until the noon hour, come home for lunch, and I would go out again about 1:00 and remain until the children had come home from school, and then pick with them until about 5:00 o'clock.

(Testimony of Rose Wong.)

Q. And that was every day?

A. That was every day.

Q. Now, during the course of apple picking up to the 17th of October, had you set your own ladder or did you have someone do it for you? [190]

A. I set my ladder.

Q. You set your own ladder? And picked your own trees? A. Not entirely, sir.

Q. I see. And so far as that picking was concerned, did you have any difficulty or trouble with respect to your ladder at any time?

A. No, sir.

Q. So far as the area was concerned occupied by the Swier orchard, was it hillside land or level?

A. At what particular time?

Q. Well, for example, the apple orchard where you picked?

A. The apple orchard was practically level.

Q. The apple orchard was practically level. And, if you know, how was it irrigated?

A. By an irrigation system that is corrugated, I would say corrugated.

Q. Corrugated? And were you aware of that during the course of your picking apples up until the date of the accident?

A. Most certainly.

Q. At any time up to the 17th of October, did you ever complain to Mr. Swier or anyone there about your ladder or about anything concerning the ladder? A. No, sir.

Q. If there had been anything to complain

(Testimony of Rose Wong.)

about, would you [191] have had any reluctance or hesitancy to speak to Mr. Swier about it?

Mr. Hudson: I am going to object to that question. That question presupposes that this lady would have enough knowledge of a ladder to know something was wrong.

Mr. Splawn: I say "anything to complain about," anything she learned to complain about. I don't think there is anything wrong with the question, your Honor.

The Court: I will let the answer stand again. Would you have had any reluctance to complain about the ladder if there was anything to complain about, that is what you asked, wasn't it?

A. No, sir.

Q. (By Mr. Splawn): I see. On the date of the accident about what time did you go out into the field?

A. About 8:00 o'clock, possibly a little earlier; the children were out for apple picking, vacation, and it is possible we went to the field a little earlier.

Q. So it would have been around 8:00 o'clock, or it could have been earlier? A. Yes, sir.

Q. And the time of the accident I believe you stated, was what? A. About 11:00 o'clock.

Q. About 11:00 o'clock. Now, during that interval of time [192] were you picking apples?

A. Yes, sir.

Q. And had you picked on more than one tree?

A. Yes.

(Testimony of Rose Wong.)

Q. Incidentally, what did you put your apples into when you picked them from a tree?

A. A box.

Q. I see. And you carried the apples in a box in what manner?

A. Oh, I am sorry, I thought what you meant, what we put them into after we had picked them. I couldn't put an apple any place until it was picked, so I put it into a bag and subsequently put it into a box.

Q. I see. That morning, the morning of the accident, had you made various sets with your ladder? A. Yes, sir.

Q. About how many trees do you believe you had worked on that morning and up to the time of the accident? A. I don't know.

Q. I see, it was more than one?

A. It was more than one.

Q. The tree that you were working on when the accident occurred, how much of the tree had you gotten picked?

A. We had nearly finished it.

Q. Were you staying there to finish the tree or was someone [193] else staying there to finish the tree, or who was to finish the tree?

A. My daughter and I were picking on the same tree; we were to finish the tree, as far as our part was concerned.

Q. I see. Now, at the time of the accident your ladder was set with respect to this tree, of course, and engaged. Do you recall how it was set with

(Testimony of Rose Wong.)

respect to the tree itself; that is, pointed toward the tree or away from the tree, or if you recall, you may not.

A. The tongue of the ladder was toward the trunk of the tree.

Q. I see. And was it in any proximity to boxes of apples on the ground?

A. The boxes were adjacent to the trees that we were to put the apples in.

Q. That set, the one that you just referred to, how if you recall, if you do, do you remember placing your ladder?

A. Yes, I remember placing my ladder.

Q. You remember placing the ladder at that particular set? A. Yes, sir.

Q. And is your memory very precise about it, and you just remember all the details?

A. I remember placing my ladder.

Q. I see. And you placed it solidly? [194]

A. I did.

Q. And the tongue was centered?

A. It was.

Q. And you made sure that the ladder was placed solidly on the ground? A. Yes, sir.

Q. The way you did that was to place the tongue in the center; did you do that with your own hands?

A. I placed the ladder, I also tested the ladder on both sides.

Q. Yes, and when you placed the tongue, for example, did you do that with your hands?

(Testimony of Rose Wong.)

A. We have to use our hands to push out the tongue of the ladder.

Q. Then, to see that the ladder was solid, you tested it by putting weight on it?

A. Yes, sir, I also tested the tongue by looking, usually we go around the ladder and see that the tongue of the ladder was placed evenly and precisely.

Q. You went around the tongue of the ladder to see that that tongue was placed evenly and precisely?

A. Yes, sir.

Q. In the center?

A. Yes, sir.

Q. And that was the set? [195]

A. Yes, sir.

Q. The ladder was on level ground, was it?

A. Comparatively, with the terrain.

Q. And the ground itself was ground that had been disked?

A. Yes, sir.

Q. It was ground, it wasn't a hard-surfaced ground, I take it?

A. Not too hard, no, sir.

Q. I mean, it had some softness to it by reason of what appeared to be disking?

A. Yes, sir.

Q. Now, where was your husband about that time, and I am speaking of immediately before the accident?

A. He was on the opposite row, across from us.

Q. Did anyone see you fall?

A. I don't know.

Q. I mean, you never learned of anyone?

(Testimony of Rose Wong.)

A. I don't know if anyone saw me fall or not.

Q. Do you happen to remember the variety of the tree; it isn't material, but I would like to know.

A. We were picking Delicious.

Q. Delicious at that time? Had you picked Jonathan apples earlier?

A. Earlier in the season, yes.

Q. Earlier in the season you had done the Johns? Now, it [196] is my understanding from your testimony on direct examination that you were up the ladder, I believe you stated the second rung from the top?

A. Yes, sir.

Q. Would that be including the top?

A. No, sir, we do not call that a rung.

Q. You do not call that a rung? You do not call the top a rung? If you did call it a rung or step, it would be the third step from the top, would it not?

A. If I called the platform, which we do not.

Q. Had you been reaching for some apples over to your left?

A. I had been picking apples to my left.

Q. I see. They were not immediately in front of you?

A. Not immediately.

Q. And, I take it that you were preparing to come down the ladder?

A. I was.

Q. You hadn't started down the ladder yet when you fell?

A. I had taken no step.

Q. You had taken no step? Now, were you leaning over to one side or to the other at that time that you fell or an instant before?

(Testimony of Rose Wong.)

A. I was not leaning to one side or the other, I had turned my body slightly to the right to bring my back away from the step so it would not hit the step. [197]

Q. So that the weight of your body was just as much centered as the tongue was centered in that ladder? A. That I do not know.

Q. Well, you were not leaning over to one side or the other?

A. Sir, when you say "leaning"?

Q. I mean stretching over beyond the sides of the ladder. A. No, I was not stretching.

Q. No, part of your body was extended over either side of the ladder, I take it?

A. I am sure I didn't measure; a ladder is very narrow at the top.

Q. Yes.

A. If I moved my body slightly to the right, my arm, no doubt, would extend beyond the ladder.

Q. But it wouldn't be any significant unbalance of your weight?

A. Sir, not of my body, no, sir.

Q. Now, were you impacting the ladder in any way, jerking it, shaking it, exerting any force on it, except just the dead weight of your body?

A. No, sir.

Q. So, all the force that was being exerted on that ladder at the time of the fall or an instant before was the static dead weight of your body?

A. No, sir, there was apples. [198]

(Testimony of Rose Wong.)

Q. And plus the apples?

A. And what weight would be exerted in my movement to turn from my left, slightly to my right, slightly.

Q. Well, were you lifting your feet off the rungs and changing the position of your feet?

A. No, sir.

Q. I see. So, the only possible shifting would be the turn of your body as you took the weight of the picking bag off the rungs?

A. Are you speaking of the shifting of my body?

Q. Yes.

A. It was the slight turn of my body, yes, sir.

Q. A slight turn? A. Yes, sir.

Q. But you were not stepping down?

A. No, sir.

Q. Both feet were on the same rung?

A. Yes, sir.

Q. And this turning was slight?

A. Not extreme, no, sir.

Q. And there was no impact or impacting, by that I mean shaking or jarring of the ladder, in that process, was there? A. No, sir.

Q. Then the next thing you became aware of, the ladder [199] tipped over on you?

A. Simultaneous with my slight movement to the right to bring the apple bag away from the step, I felt the ladder slightly twist and give under my feet, and it went, it just went out from under me.

Q. Well,—

(Testimony of Rose Wong.)

The Court: (Interposing) Just a moment, Mr. Splawn, let her finish.

Mr. Splawn: Pardon me.

A. (Continuing) I grabbed for the limb which was to my right. The ladder fell to the ground and I did.

Q. (By Mr. Splawn): The ladder fell completely to the ground? A. Yes, sir.

Q. Did the ladder go to the left?

A. Yes, sir.

Q. It went to the left? The apples which you, of course, before had been picking were to your left?

A. The apples were slightly to my left, yes, sir.

Q. Now, you mentioned an occasion between three and four weeks after your entry into the hospital when Mrs. Swier was there. A. Yes, sir.

Q. At the hospital.

A. Yes, sir, she visited me. [200]

Q. What is that?

A. She visited me at the hospital, yes, sir.

Q. Well, I direct your attention to an occasion to which you testified on direct examination that between three and four weeks after entering the hospital Mrs. Swier was there and visited you, and then you testified as to some remark or statement that Mrs. Swier made, do you remember the occasion now to which I am referring?

A. Yes, I do.

Q. Now, you have a very precise memory of that, I presume? A. I do.

(Testimony of Rose Wong.)

Q. And on that occasion or on that day were you suffering from any incompetency or inability to think or know what you were doing?

A. No, I was not incompetent.

Q. You were not incompetent? Your memory of what occurred, so far as the accident was concerned, was just as acute and as good then as it is today? Were you suffering from any lack of memory or inability to remember?

A. No, I suffered from no lack of memory. I have received medicines at various times, pain-killers.

Q. I am speaking now, directing your attention specifically, Mrs. Wong, to the occasion which you testified about on direct examination, that occasion being between three and four weeks after your entry into the hospital and it [201] was an occasion when Mrs. Swier happened to be there and made a statement, do you remember the occasion?

A. Yes, sir.

Q. Now, I now ask you on that date were you suffering from any lack of memory or suffering from anything that would cause you not to remember precisely and accurately what had happened to you in the accident? A. No, sir.

Q. Now, you mentioned on your direct examination that some gentleman had been there, had visited you at the time Mrs. Swier was there?

A. Yes, sir.

Q. And had taken some statement from you?

A. Yes, sir.

(Testimony of Rose Wong.)

Q. And you told him, I suppose, as best you could recollect at that time, what had happened to you in the fall, did you not?

A. I related some circumstances.

Q. I see. Do you remember signing a statement?

A. I signed it. [202]

* * * * *

Q. (By Mr. Splawn): Mrs. Wong, at the time of the accident did you hear any sound at the top of the ladder or anywhere else on the ladder?

A. No, sir.

Q. You say it gave away, I was wondering whether you heard any sound?

A. No, sir.

Q. I mean any creaking, or whatnot, to indicate any play or looseness?

A. I heard no sounds.

Q. You heard no sounds? Now, you mentioned on direct examination at the time of leaving the hospital you returned home. By that do you mean that you were actually maintaining a permanent home at that time on the Swier place?

A. No, sir.

Q. After you left the Swier place in April of the following year, I take it, I think I heard you say that, or maybe it was in the opening statement, April, 1956, when you left the Swier place, or could I be mistaken? [230]

A. It was in the spring, I can't tell you if it was April, but it was in the springtime.

Q. I see. And during that period of time you were occupying the tenant house on the Swier

(Testimony of Rose Wong.)

place? A. Up to that time, yes, sir.

Q. They were making no charge for that, were they? A. No, sir.

Q. Now, where did you go, did you say, when you left there?

A. I rented a house that was on North Cowiche Road.

Q. And you remained there until the spring of 1957? A. Fall of 1957.

Q. Fall of 1957? Well, then, had that become your permanent home? A. Oh, no, sir.

Q. Well, your husband was with you?

A. He was.

Q. Where was your home, if that wasn't your home?

A. I was paying for a home at that time in Boise, Idaho.

Q. Oh, I see. You were not occupying it?

A. Not at that time, no, sir.

Q. Nor your husband? A. No, sir.

Q. I see. You mentioned that one time, as I recall, you said in the forepart of January, 1956, Mr. Swier—correct me if I am mistaken—had sat down at the table [231] at your place and drawn a diagram?

A. Subsequent to his return, yes, sir.

Q. Do you have that piece of paper?

A. No, I don't.

Q. Didn't you save it? A. No, I did not.

Q. You have had several conversations with both Mr. and Mrs. Swier concerning the accident?

(Testimony of Rose Wong.)

A. Yes.

Q. And they inquired of you, did they not, as to what happened?

A. No, I cannot remember that they inquired of me of what happened.

Q. You don't remember them coming out to you either at the hospital or after you returned to their place from the hospital, and asking what had happened? A. No, sir.

Q. They showed no curiosity at all to find out from you what had happened?

A. I don't remember they asked me what happened.

Mr. Splawn: That is all.

Cross Examination

Q. (By Mr. Gavin): Mrs. Wong, when is it do I understand, that you first came here to the Yakima Valley? [232]

A. With regard to the accident and events surrounding it?

Q. Yes, where you remained for any length of time before it happened?

A. I came to the valley in June, 1955.

Q. Do I understand by that that you must have been here before, you and your husband, on other occasions in the past?

A. My husband had visited in the valley, not to reside, in 1945. I had resided in the same tenant house for three or four months to assist in religious work.

(Testimony of Rose Wong.)

Q. I see. Do I understand that you are a missionary as well as your husband, or just yourself?

A. Both of us.

Q. Both of you. Are you an ordained minister?

A. Yes, I am.

Q. I see, and your husband, too?

A. Yes, sir.

Q. I am not familiar with this; the reason I ask you, Mrs. Wong, do you have some church that employs you, the two of you?

A. Not at present, sir.

Q. Have you in the past been employed, you talk about a \$300 compensation.

A. We do not, we are not employed.

Q. I see. [233] A. As missionaries.

Q. Well, the thing I am curious about is that you say that there has been a loss of income of \$350 a month to you as a missionary. Now, where would you get that \$350, would somebody give it to you, or how does that work out?

A. We continually engaged in religious work, going from place to place, holding meetings at their invitation. We were given free-will offerings; we were also helped by our friends.

Q. I see. These sums of money that you believe you may lose by reason of your accident are contributions that are made at services which you and your husband might hold, is that what I understand?

A. Would you please state that question again?

Q. Well, do you travel from place to place,

(Testimony of Rose Wong.)

do you and your husband, do you hold meetings and services and you pass the plate and people contribute to you?

A. I don't pass the plate, no, sir. The plate is passed.

Q. The plate is passed and the money is in it?

A. Yes, sir.

Q. That is the source of the \$350?

A. Some of it, yes, sir.

Q. Well, is there some other source that you consider? A. Oh, yes. [234]

Q. What is that?

A. I have had many friends who are interested in our work over the years who continually contribute to our work.

The Court: May I ask a question just to clear it up in my mind: Were you on any regularly fixed salary from a missionary organization or a church organization? A. No, sir.

The Court: You were not? All right.

Q. (By Mr. Gavin): I see. Well, then, perhaps you can explain to us why is it that these people will no longer contribute to you and your husband because you have had this injury?

A. Did I state they no longer contributed to us?

Q. What?

A. Did I say they no longer contributed? At the present time we are not engaged in these meetings.

Q. Well, my understanding is, Mrs. Wong, I am sure that you will continue with your work?

(Testimony of Rose Wong.)

A. I am unable to do it.

Q. What? A. I am unable to carry on.

Q. And what is that that you are unable to carry on?

A. I am unable to, either by myself, to carry on religious work, or to assist my husband in interpreting.

Q. Is he capable of doing it? [235]

A. Not alone, sir.

Q. Would you mind giving me an example of the kind of work that you carried on, I really don't understand, Mrs. Wong, what it is that you did?

A. Evangelistic meetings, helping in various churches in various ways, such as teaching the Bible, teaching Sunday school.

Q. Have you done that kind of work out in the Cowiche area? A. Oh, yes, sir.

Q. I see. Do you continue with that kind of work now? A. I am not engaged in anything.

Q. Does Mr. Wong continue with it?

A. He is unable to.

Q. By reason of this accident?

A. I am unable to assist him.

Q. I see. What assistance does he need?

A. I am his interpreter.

Q. I see, and that requires you to interpret what he says? A. Yes, sir.

Q. Now, Mrs. Wong, when you came to the valley then in 1955 and before this accident occurred, is that the reason you and Mr. Wong came here, to do evangelistic and missionary work?

(Testimony of Rose Wong.)

A. When we came to the valley in 1955 we expected to stay several weeks to pick fruit to augment our income. [236]

Q. Then, did you have any plan or contract, or anything of that sort, to do work any other place?

A. Previous to that time, I did.

Q. I see. Well, what happened to that work?

A. That didn't work out.

Q. You mean, the contract which you had to do the work was what, was not completed?

A. Was not fulfilled by the other party.

Q. I see. Did you receive any payment from them on account of their failure to fulfill their contract? A. We received compensation.

Q. Covering what period of time?

A. No time was stated. Our contract was for two years.

Q. Two years from when?

A. From the fall of 1954 on.

Q. To the fall of 1956?

A. It would have covered that, yes, sir.

Q. Was it some church organization that employed you? A. Yes, it was.

Q. I see. And you say that when they didn't go through with the contract, did they make you some payments to cover the period from '54 to '56?

A. No, not immediately, sir.

Q. Did they, eventually?

A. Eventually they did. [237]

Q. Since you suggest that you would lose in-

(Testimony of Rose Wong.)

come of \$350 a month, Mrs. Wong, from the time of your injury, would you mind telling us how much income you did receive from that source from this church organization for the two years, in '54?

A. They contracted to pay Mr. Wong and I \$350 a month for our living expenses, plus adequate funds to cover the care of our three oldest children, who were then living with the Swiers.

Q. How much money did they pay you in satisfaction of that obligation?

A. I am not allowed to tell you, sir.

Q. Well, you were asking for \$350 a month from these people here, Mrs. Wong, from the time of your injury. Now, if you received some compensation from some other source that covers '54 to '56, that would serve to reduce that. I think it's only fair you tell us what it is.

A. No, sir, I didn't receive it for that period and I signed a statement not to disclose the amount of that settlement.

Q. Well, what period did you receive it for?

A. There was no period stated in the settlement, sir. [238]

* * * * *

Q. Your husband, you say, has done no work of any kind in the missionary field since your accident?

A. My husband has not done any missionary work since my accident. [240]

Q. Or any religious or evangelical work of any kind?

A. No, no traveling.

(Testimony of Rose Wong.)

Q. Has he done any locally?

A. He might have talked one or two occasions, but not as a steady thing.

Q. Is it your intention, Mrs. Wong; I am sorry if I don't keep my voice up, just tell me because I want you to hear what I ask you; do I understand that it is your intention because of this accident, now to abandon this missionary or religious work that you have done in the past?

A. I am forced by reason of disability to discontinue my work.

Q. You plan to make—you have no plans to resume it on any basis, limited or otherwise?

A. No, I don't at present, sir.

Q. Nor does your husband?

A. At present, no, sir.

Q. Now, I got the impression once in your testimony that you had only picked fruit for a few days before the accident happened, and in another part of your testimony that you had come up here in the early summer and had picked during most of the summer. Now, what is the situation?

A. No, sir, I didn't pick during the summer.

Q. How many days had you picked before your accident occurred?

A. I picked a week at pears, and we had been about a week on the apples when the accident occurred.

Q. I see. Do I then understand that your husband, however, had done work in addition to that in the fruit?

A. Yes, he had.

(Testimony of Rose Wong.)

Q. Did he have a regular job with Mr. Swier?

A. No, sir.

Q. Well, did he work every day from the time he came here in 1955 until you were injured?

A. No, sir.

Q. What days did he work?

A. I can't tell you, sir, it was maybe one day, maybe five days; it was not regular work.

Q. What type of work did he do?

A. He picked cherries maybe six days. He painted a shed and he propped a few apples. I believe he thinned apples perhaps one or two days, as my memory gives it to me now.

Q. Is this in addition to that; did the two of you pursue your religious work in the Cowiche area, did you continue to do religious work besides your husband picking fruit and you picking fruit?

A. We were busy with Mr. and Mrs. Swier carrying on Sunday [242] school work. We were helping as much as we could in the Sunday school.

Q. Where did your compensation come from during that period?

A. From friends interested in us.

Q. Did the Swiers pay anything for the work that you did in the fruit or on their ranch?

A. When we were hired by the Swiers they paid us.

Q. I see. Now, that was the situation you were in and the way that you were earning your living, practically, if I may use that term, at the time that the accident occurred?

A. Yes, sir.

(Testimony of Rose Wong.)

Q. You had at that time, then, no contract of any kind to go out into the missionary field?

A. No, sir.

Q. Now, after the accident occurred, how long did you and your husband continue to live here at Cowiche?

A. Until the first of August, 1957.

Q. Then you moved to where?

A. Portland, Oregon.

Q. Now, is that where you now reside?

A. It is.

Q. Well, how long has it been since either you or Mr. Wong lived in Idaho, Mrs. Wong?

A. We left Idaho in the fall of 1955. [243]

Q. You were injured in the fall of 1955?

A. That is right.

Q. Well, how did you leave Idaho in the fall of '55?

A. Oh, I beg your pardon, the fall of '54.

Q. Fall of '54? A. I am sorry, sir.

Q. Where had you lived in Idaho?

A. Boise.

Q. Boise? Were you doing religious work there?

A. Yes, I was.

Q. And your husband? A. Yes, he was.

Q. Did you have any other source of income there other than religious work?

A. No, we did not.

Q. Were you affiliated with some church there?

A. Yes, I was.

(Testimony of Rose Wong.)

Q. What happened to that work in Idaho, why did you leave there?

A. We discontinued that place because we had accepted a contract with a new party in the religious work.

Q. And where did that involve you going to perform it? A. To the foreign field.

Q. To the foreign field? You then left Idaho in the fall of '54, and where did you go then? [244]

A. We went to Portland, Oregon.

Q. And then from Portland, Oregon, I take it, you came here in June of '55? A. Yes, sir.

Q. And remained here until August of '57, and returned to Portland? A. Yes, sir.

Q. Are you employed down there at all now, Mrs. Wong? A. No, I am not.

Q. Or your husband?

A. Yes, he is at present working part-time.

Q. I see. What is his employment now?

A. He works part-time at a cleaners.

Q. At a cleaning establishment?

A. Yes, sir.

Q. I see. Now, Mrs. Wong, when you fell or had your fall, I am personally not concerned how it happened, so don't worry about that part of it; I am concerned with what happened to you in the fall. How did you strike, what did your body strike, and what happened to you, do you mind telling me that?

A. I cannot tell you what my legs struck. It

(Testimony of Rose Wong.)

must have been a hard substance to shatter the bones in my leg, and after I had landed full length on my back, I put out my foot. I felt, well, numb to my hip, and put my [245] foot up and I saw the jagged bones sticking out through my sock.

Q. You, undoubtedly, fell on your left leg or ankle, did you not? A. I cannot tell you.

Q. You don't know what part of your body hit what at the time of the first injury?

A. I know my leg hit something; what, I don't know.

Q. Something hard? A. Yes, sir.

Q. Was there anything around under the ladder besides dirt or disked soil that you could have struck, Mrs. Wong, as you remember?

A. Not hard substance, sir.

Q. Boxes, for example?

A. Not in closeness.

Q. I see, or the ladder itself; perhaps you may have fallen on it?

A. I think that could have been possible, I don't know.

Q. You are conscious that your leg or ankle, the left one I am referring to, must have struck something that was hard?

A. Well, it was so simultaneous, sir, that as it struck it was numb clear to the hip. I had that instant sensation. [246]

Q. Now, you have shown us, Mrs. Wong, and the gentlemen here of the jury, a scar on the left side of your ankle, a long scar running up and

(Testimony of Rose Wong.)

down. Is that the point at which the bones compounded or went through the leg, finally?

A. What I showed the jury was half a leg, it couldn't be a point, but the point where the bones protruded was at this (indicating).

Q. Yes, you are pointing to the area of compression of the deepest part of your scar, is that right? A. Yes, sir.

Q. Now, you haven't expressed any, or given us any statement about any pain that you had at the time that you fell, but I presume you must have had some, didn't you?

A. I fainted; when I came to I felt extreme pain.

Q. And that extreme pain was felt where?

A. I was utterly ill with it all over, particularly, of course, in my leg.

Q. Have you had any medical training at all, Mrs. Wong? A. No, sir.

Q. Had you ever been in a hospital before this particular time you went to Memorial?

A. No, sir; that is, with the exception of the birth of my children.

Q. Yes, other than for childbirth you had not had any [247] injury or illness that confined you to a hospital? A. No, sir.

Q. Had you had any condition of illness or injury at all here in the Cowiche area from the time you arrived here in '55 until this accident happened, that would give you any knowledge of Dr.

(Testimony of Rose Wong.)

Zimmerman, for example, of who he was or where he practiced? A. No, sir.

Q. Did you even know his name at the time this accident occurred? A. No, sir, I did not.

Q. What about Dr. Lugar, did you know who he was? A. No, I did not.

Q. Or where he practiced?

A. No, I did not.

Q. Did you have, then, any prejudice or feeling against medical doctors at all, as such, Mrs. Wong?

A. Oh, no, sir.

Q. I don't gather that you objected in any way to Mrs. Swier calling Dr. Zimmerman to take care of you after you had had this fall, did you?

A. No, I did not object.

Q. Did you, when you fell and were in the orchard, did you retain or regain consciousness after you fainted? A. I regained consciousness.

Q. Were you aware of what was going on, or did you suffer from shock at all?

A. I was aware of what was going on.

Q. Do you know what I mean by shock, a feeling of coldness, illness, following a severe injury; did you have any feeling of that kind?

A. I felt pain and I felt an illness, but I was conscious.

Q. Do you know whether or not you were in a state of shock, however?

A. No (witness shakes head). I know that I was competent as I directed those around to make a splint for my leg. That is how I can measure

(Testimony of Rose Wong.)

that I was conscious enough to tell them how to make the splint.

Q. I see you directed someone to make a splint for you? A. Yes, sir.

Q. Who was that?

A. I believe Mr. Swier and the rest of the pickers had gathered round, and they were wondering at the time, they wanted to place me on a sofa, a lawn lounge, and of course, the leg was dangling and they knew that I couldn't be moved in that condition. I said, "Break the prop and slide it under and tie it above and below," which was done.

Q. I see. Someone took a tree prop?

A. Yes, sir. [249]

Q. Which is a, well, it's a board, isn't it?

A. Yes.

Q. And tied it onto your fractured leg above and below the bone?

A. Well, I know they tied it above and below the area, I cannot point to it.

Q. Do you remember, did you know that someone had called for a doctor?

A. Mrs. Swier told me she had called.

Q. But I mean were you aware that a doctor had been called as these things were going on in the orchard and the splint was being fixed?

A. She came out, I don't know at what juncture in the excitement, but she told me previous to the arriving of the ambulance.

Q. Now, do you remember any nurse coming

(Testimony of Rose Wong.)

there and giving you any care or assistance before the ambulance arrived?

A. The nurse came but she couldn't give me any assistance.

Q. I see. Did she give you any medication or drugs or pain relievers, or anything of that sort, at the time you were there and before you went in the ambulance?

A. She had in her hand a syringe and I asked her, "Is that demerol?" She said, "Yes." I said, "I am allergic to demerol," so she did not give me the injection.

Q. I see. You had had demerol before, then, I take it? [250]

A. Yes, I had.

Q. I see. Now, did the ambulance attendants give you any kind of medication?

A. No, sir.

Q. Drugs, or anything of that sort?

A. No, sir.

Q. About what time of day would you say it was, Mrs. Wong, that you sustained this fall?

A. About eleven o'clock in the morning.

Q. And do you remember about what time it was you reached the hospital?

A. In my judgment it was between twelve and one.

Q. Between twelve and one? And an hour to two hours after you had sustained the fall?

A. The ambulance didn't arrive until quite a good deal of time had elapsed.

Q. Well, your best recollection would be that it was between an hour to two hours after you fell

(Testimony of Rose Wong.)

before you were physically delivered to Valley Memorial Hospital? A. Yes.

Q. Had you ever been in this hospital?

A. No.

Q. Or have any knowledge about it or know of the people there? Did you have any knowledge about it or know of the people or nurses who treated people in Memorial [251] Hospital?

A. No, I was not acquainted with the nurses or any of the people.

Q. I take it you made no objection to being taken to this hospital for treatment?

A. No, sir.

Q. Well, where were you taken to when you first arrived there with the ambulance attendants?

A. Emergency.

Q. Do you remember where that is in the hospital, for example, as compared to where you later were in rooms or in surgeries?

A. No, sir, I could not tell you.

Q. I see. By this time were you still in a state of serious pain, were you?

A. It was painful, yes, sir.

Q. Severely painful?

A. It was a severe pain, yes, sir.

Q. Were you given any sedation, any drugs, any injections of any kind when you got to the hospital and were in emergency?

A. I arrived in the emergency and I remember expressing again, "Please don't give me demerol."

Q. That was expressed to whom?

(Testimony of Rose Wong.)

A. The nurse and attendants. [252]

Q. I see.

A. Subsequently she gave me a shot of morphine.

Q. How do you know it was morphine?

A. The orderly stood on one side, the nurse on the other. The nurse said, "Shall I give her morphine?" The orderly says, "Well, if you had a broken leg, what would you do?" And she gave me the shot.

Q. This is in emergency? A. That is right.

Q. I am curious about this person you describe as an orderly. Why do you say it was an orderly?

A. Well, he was of the male gender.

Q. I see. Do you understand what an orderly is at a hospital, what he does?

A. I am not acquainted altogether with his work, no, sir.

Q. I see. There was some man there?

A. He had on a uniform, sir.

Q. A white uniform?

A. I cannot tell you the color of it.

Q. This is a different place, however, than the surgical room to which you were later taken?

A. Yes, sir.

Q. And these would be different people, would they, than were in the surgery, this orderly and this nurse?

A. I cannot tell you what nurses wheeled me to surgery [253] because they stand behind your head, you don't get a view of their face.

Q. You were on a table of some kind?

(Testimony of Rose Wong.)

A. I was put on a stretcher after they took X-rays, yes, sir.

Q. Laying on your back? A. Yes.

Q. Now, were you taken to some place to have X-rays taken? A. No, sir.

Q. And where were the X-rays taken?

A. In emergency.

Q. And in this same emergency place?

A. Yes, sir.

Q. Do you remember who took those, was it men or women? A. I can't tell you.

Q. You just know they were taken?

A. Yes, sir.

Q. Did the morphine have any effect on you, do you believe, that you were given?

A. I don't know, sir.

Q. I see. Do you know how long it was that you were in this emergency, Mrs. Wong?

A. No, sir, I don't know how long.

Q. Do you know when it was that you reached the surgery?

A. As soon as they finished the X-rays they put me on the [254] stretcher and took me immediately.

Q. You were lying on your back and being pushed on a cart?

A. Yes, a long cart, stretcher.

Q. Had anybody removed this splint at that time? A. No, sir.

Q. Had anyone examined your wound?

A. No, sir.

(Testimony of Rose Wong.)

Q. You were taken to some other place in the hospital, however, on this cart?

A. Surgery.

Q. Yes, and you recognized it as a surgery, did you, when you went in? A. Yes, sir.

Q. Now, how were the people dressed in the surgery, do you remember that, men and women?

A. They had caps. I can't tell you the cut of their uniforms. I was aware it was not ordinary dress.

Q. I see. You were aware of something about their dress that indicated this was a surgery you were going to?

A. No, sir, I saw the above apparatus. I was placed on the table for surgery.

Q. Did these men and women who were in this surgical room wear masks, for example, over their mouths?

A. My memory is quite clear that some of them did, yes.

Q. And they wore tight-fitting caps on their heads? [255]

A. Well, they are small hats that fit down over the head in this fashion, sort of square-like (indicating).

Q. Did you understand when you went there, from some source, that some surgical procedure was going to be performed on you?

A. I understood that I would be attended to medically.

(Testimony of Rose Wong.)

Q. I see. Now, were you in a state of shock at that time?

A. I was not in shock to the extent that I did not understand what was being said to me and what was being done to me.

Q. How many people were there in the surgery, do you know? A. No, sir.

Q. Up to this time, Mrs. Wong, you had, as far as you know, never laid eyes on Dr. Zimmerman, had you? A. No, sir.

Q. You didn't know whether he was a tall man or a short man or a young man or an old man, did you? A. No, sir.

Q. Now, when do you think it was, or do you say it was, that you first ever saw Dr. Zimmerman in connection with this case?

A. In surgery that day.

Q. And you say this because some man, as you told us just this morning, stood by your head, is that right?

A. No, sir, he introduced himself as Dr. Zimmerman. [256]

Q. And he said what to you?

A. He said, "I am Dr. Zimmerman."

Q. What else did he say?

A. He asked me if I was in good health.

Q. Did he ask you whether you were dizzy or had ever been dizzy? A. Yes, sir.

Q. Did he ask you whether you had ever had heart trouble? A. Yes, sir.

Q. You replied "No," to all this?

(Testimony of Rose Wong.)

A. Yes, sir.

Q. And then what was done to you?

A. Then they stripped the upper part of my body and told me they were giving me a spinal injection, and they turned my body on this side (indicating) and told me to put my knees, draw my knees up in my arms in order to get in position, and they pushed with some pressure on my body. I felt the needle go in my back bone and it felt to me as though they were feeling for the proper place; it was painful. Then, all of a sudden I felt like fire reaching my limbs, and I was not immediately turned back on my back, but there was a space of just a few minutes, then I was turned back on my back.

Q. Which one of the people was it there that gave you that spinal? [257]

A. I cannot call him by name.

Q. Then there were two men there, you say, was it a man or a woman?

A. I do not know who gave the spinal injection.

Q. Do you know how many, whether it was a man or a lady that gave you the spinal injection?

A. I heard a man's voice.

Q. Was the man who identified himself as Dr. Zimmerman wearing a mask and one of these caps, too, wearing any kind of a uniform?

A. No, sir.

Q. Just in street clothes?

A. I can't give you a description of his clothes.

Q. Well, now, when your deposition was taken,

(Testimony of Rose Wong.)

Mrs. Wong, didn't you tell me that you assumed that this man was Dr. Zimmerman, that you were in a state of shock and you assumed that is who it was that came and stood by you?

A. It's possible the deposition reads that way, but I have considered it in my mind and I remember distinctly of Dr. Zimmerman introducing himself.

Q. You didn't tell me that when your deposition was taken, though, did you, back on March 15 of 1957?

A. I have not reread the deposition.

Q. Well, it says it was taken at 2:30 o'clock p.m., Friday, [258] March 15, 1957, in Mr. Splawn's office.

A. Yes, I remember the occasion.

Q. Do you remember being there?

A. Yes, sir.

Q. I examined you like I am now?

A. Yes, sir, I remember you.

Q. You were under oath at the time?

A. Yes, sir.

Q. And did you not testify as follows; I am reading from page seven, counsel, of the deposition:

"Q. Did he identify himself as Dr. Zimmerman when you first saw him in the operating room?"

"A. I cannot tell you whether he introduced himself or not.

"Q. I take it you gathered or knew it was Dr. Zimmerman who was there to see you?"

"A. In a state of shock I assumed that is who it was."

(Testimony of Rose Wong.)

Q. (By Mr. Gavin): Now, did you so testify, Mrs. Wong?

A. If it is written there, I so testified.

Q. Well, is your recollection of these events occurring after this severe injury October 17, 1955, better today in court than it was a year ago?

A. I think it's possible, we recall to mind after considerable [259] thought many incidents that we don't at particular times.

Q. Do you feel, really, Mrs. Wong, that as you lay in surgery having received a shot of morphine, having this severe pain that you told us about after this injury, never having ever been in a surgery of this type before, that you really have a sure recollection of who it was that was there and that you talked to first was a doctor? A. Yes, I do.

Q. And that recollection has come upon you recently, apparently?

A. I wouldn't say this moment or this week, but I know I saw Dr. Zimmerman's face.

Q. When was it that you first remember, Mrs. Wong, in connection with being here today in this lawsuit against Dr. Zimmerman, that it was Dr. Zimmerman who was there when you first went into surgery; when was it you first remembered that?

A. I beg your pardon; would you repeat yourself?

Q. That is right, that is not a good question. I talk too much and it can't be a good question. Put it this way: when was it that you first remember

(Testimony of Rose Wong.)

that Dr. Zimmerman had introduced himself to you at the surgery?

A. Dr. Zimmerman stood slightly back of me on this side [260] (indicating).

The Court: I think you misunderstood the question, Mrs. Wong. He is asking you when you first recalled that?

Mr. Gavin: No, she has testified, your Honor, that Dr. Zimmerman introduced himself and said, "I am Dr. Zimmerman."

Q. Now, when was it, today is the 25th of March, I guess it is; how recently was it that you remembered that Dr. Zimmerman introduced himself to you in the surgery, when you were first wheeled in there?

A. I cannot give you a specific date, but I know I have been very much aware of that for some time.

Q. You were not aware of it in March of 1957, however?

A. When that question came to me I didn't at that time recall it, but I have since, and it is very clear.

Q. Have you talked to anybody who has refreshed your recollection about this?

A. No, sir.

Q. Have you talked to anybody about it ahead of coming here to testify about whether he introduced himself to you or not?

A. I have talked to my attorney, sir.

Q. Did your attorney tell you anything that

(Testimony of Rose Wong.)

would have refreshed your memory as to whether he introduced himself or not? [261]

A. My attorneys told me to tell the truth.

Q. Yes, but did you talk about whether Dr. Zimmerman had introduced himself to you?

A. We discussed this matter.

Q. I see. Did you discuss the testimony that had been given in your deposition back in '57?

A. No, sir.

Q. Now, Mrs. Wong, were you conscious or aware of anyone engaging in the cleaning of your wound at the time you were in that surgery?

A. No, sir.

Q. Then, if the wound was cleaned in the surgery, it must have been done after you were rendered unconscious by the anesthetic?

A. Yes, sir.

Q. Now, no doctor that you remember undertook to examine or deal with the actual point of wound itself before you became unconscious?

A. No, sir.

Q. I see. Now, from the time that you were wheeled into the surgery until the time you became unconscious, do you have any idea of how much time elapsed?

A. I shall reiterate your question and see if I understood it properly.

Q. Yes, that is fine. [262]

A. You asked me how long a time elapsed between the time I was wheeled into surgery until I became unconscious?

(Testimony of Rose Wong.)

Q. You counted one, two, three, four, and went to sleep?

A. They had given me the spinal, and as I related, had taken the pins out of my hair. They had taken and unclothed the upper part of my body and replaced it with a white gown. They had waited a little space of time before turning me back on my back. Then I was told—and had my arm placed in position for an injection in the arm—and told to count, and I remember I counted to forty-two and became unconscious.

Q. Well, that doesn't quite answer my question.

A. I can't tell you in minutes.

Q. How long?

A. Well, to count forty-two slowly would be forty-two seconds.

Q. Well, would you have been in there as much as, say, ten minutes from the time you were wheeled in until you were out, or five minutes, or an hour, or what would you say?

A. Oh, no, not an hour. I think the time could be relatively close if set between seven to ten minutes, someplace along that region.

Q. Now, after you had regained consciousness I assume you must have been back in some room in the hospital, were [263] you not?

A. Yes, sir.

Q. You were not in surgery? A. No, sir.

Q. And when is the first time that you saw Dr. Zimmerman after that time?

A. Doctor Zimmerman came to visit me.

(Testimony of Rose Wong.)

Q. That same day?

A. No, sir, I don't think so.

Q. The next day?

A. Yes, sir, I think it was the next day.

Q. Did he come and visit you, as I understand you, every day? [264]

* * * * *

DR. MAX MARK BOCEK

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. Hudson): Will you state your name, please? A. Max Mark Bocek.

Q. And where do you reside?

A. Yakima, Washington.

Q. And what is your occupation?

A. I am a physician and surgeon.

Q. Where do you maintain your office?

A. It's 307 S. 12th Avenue, Yakima.

Q. Doctor, I wonder if you would give us your educational background?

A. I received my medical degree from the University of Oregon Medical School. I interned there for one year. Following that I had four years of orthopedic surgery training at the University of Oregon Medical School.

Q. Since that, now, when did you enter the active practice of orthopedic surgery?

A. I started practice in July of 1955. [265]

Q. Here in Yakima?

(Testimony of Dr. Max Mark Bocek.)

A. In Yakima, yes, sir.

Q. And you have since been so engaged?

A. Yes, sir.

Q. Now, are you a member of any of the either local or national societies?

A. A member of the Yakima County Medical Society, the State Society, and also the American Medical Society.

Q. Are you acquainted with the plaintiff in this action, Rose Wong? A. I am.

Q. Can you tell me when you first saw Mrs. Wong?

A. Yes, I first saw her on, let's see, November 20, 1956.

Q. And what was the cause or occasion of her visiting you, Doctor?

A. She was sent to me because of two areas of slight drainage on the left ankle.

Q. What condition did you find the left ankle to be in?

A. Well, to inspection the ankle had a fairly normal appearance as far as alignment was concerned. There were two scars on the ankle, one lateral and one medial. The ankle was fixed in a slight equinus, which is a slight pointed-down position. The range of motion of the ankle joint was about, oh, five degrees or less. There were two small punctate areas in the middle of [266] these two scars I mentioned on the outside and the inside of the ankle from which there was extruding a very small

(Testimony of Dr. Max Mark Bocek.)

amount of very thick pus. With pressure, you could bring it out.

Q. Now, did you ascertain what had brought about this condition, Doctor?

A. Well, by the history that she told me, in 1955 in the fall, that I think was October, as I remember, that she had fallen and sustained a compound comminuted fracture, from her description is what it sounded to be.

Q. Did she advise you that the situation of gas gangrene had developed?

A. Yes, she mentioned it had been some problem there; that it did have, apparently, gas gangrene, however, at this time there wasn't any traces of any such.

Q. Yes; now, what treatment did you give the leg, Doctor?

A. Well, on two occasions we admitted her to the hospital and curetted out the sinus tract, these little openings, to go down at the edge to see if we could find the affected bone and, if so, remove it by scraping; and this was done on the first occasion in May of 1957—now, excuse me, the first occasion in December of 1956, and then the second occasion was May of 1957.

Q. Now, during that period of time that you were treating Mrs. Wong was there continual drainage of the leg? [267]

A. Yes, she had continual drainage until one of the later visits she had finally stopped, but during this episode the two hospitalizations, especially,

(Testimony of Dr. Max Mark Bocek.)

there was some continued drainage of the small amount that was there.

Q. The wound has recently become healed completely over?

A. Yes, recently I rechecked; it's completely healed.

Q. Now, what effect, Doctor, has this injury had upon the use of the left leg or foot?

A. Well, due to the joint injury because of the fracture she has sustained, it has resulted in a stiff ankle on this left side, in a slightly toe-down position, and because of the injury to the joint she shows signs of developing what they call a traumatic arthritis, a breakdown in the joint.

Q. Now, is there at the present time, Doctor, any presence of osteomyelitis?

A. On the last recheck there wasn't any clinical signs at all of any sustaining.

Q. But there had been previously?

A. There had been previously.

Q. Now, from the standpoint of time, Doctor, how long after there is apparently no O.M. will it be before a medical man such as yourself can say that there is no danger of an outbreak?

A. Well, you can never say for sure that it would never [268] come back.

Q. Is there an accepted theoretical space of time in which you feel that there has been complete retardation?

A. Well, I should say if you could follow the ankle for a period of a year and a half and two

(Testimony of Dr. Max Mark Bocek.)

years and there had been no drainage, that you could be reasonably sure that it was healed, but even so——

Q. (Interposing): Even so, you would not say that there was no chance for it to recur?

A. No, I wouldn't.

Q. Is it possible, Doctor, in injuries such as this that O.M. might break out in some other portion of the body rather than right at the point of the injury?

Mr. Gavin: I object to the form of the question. We are not concerned with possibilities, your Honor, but only with reasonable medical probabilities.

The Court: I think I will sustain the objection.

Mr. Gavin: Not whether it is possible.

Q. (By Mr. Hudson): Is there a probability that osteomyelitis might appear, disclose itself in some portion of the body other than the point of injury? A. I wouldn't think so.

Q. Do you think it would be confined to the injured area?

A. Most of them are to the injured bone.

Q. Do they ever break out elsewhere, Doctor?

A. I object to the question, your Honor.

The Court: Well, I will sustain the objection on that.

Mr. Hudson: I didn't get the Court's ruling.

The Court: I will sustain the objection.

Q. (By Mr. Hudson): Now, you have some X-rays, recent X-rays of this lady?

(Testimony of Dr. Max Mark Bocek.)

A. I have, yes (witness produces X-rays).

The Court: Would you like to have the view box set up here?

Mr. Hudson: Yes, sir.

Mr. Gavin: It's right here, your Honor.

The Court: Oh, I see; I didn't see it.

Clerk of the Court: Marking this Plaintiff's 18.

(Whereupon, Plaintiff's Exhibit No. 18 was marked for identification.)

Q. (By Mr. Hudson): I hand you an X-ray negative which has been marked for the purposes of identification as Plaintiff's Exhibit 18, Doctor, and ask you if you will tell me what that is (hands photograph to witness)?

A. This is a view taken of three projections of the left ankle.

Mr. Hudson: I am going to offer it.

Mr. Gavin: I have no objection. This is an X-ray that the Doctor himself has taken? [270]

Mr. Hudson: Has taken.

Mr. Gavin: Yes.

The Court: It will be admitted then.

(Whereupon, said X-ray was admitted in evidence as Plaintiff's Exhibit No. 18.)

Q. (By Mr. Hudson): Would you be good enough to place it in this viewer, Doctor, and explain the joint situation to the jury?

A. (Witness places X-ray in view box): This is taken with three views of this left ankle, showing here the tibia, the large bone of the lower leg, the fibula, the small bone, the astragalus or scaphoid

(Testimony of Dr. Max Mark Bocek.)

area. It's the true ankle bone itself; it is just the name for it. As you look at the X-ray, you will notice that the tibia has straight alignment, it shows no shift, but it does show here deformity (indicating). There is a rounded mass here evidenced. There is a marking in here evidenced that is not usual (indicating). There is cross-union between the small bone and the large bone here (indicating). There is apparent fracture with a little minor displacement of the fibula here (indicating). It looks well healed, though, it shows continuity. Now, as far as the ankle joint itself, there is no space discernible in this area where the ankle joint actually lies. Normally you see a little bit of a space, more, [271] it would appear here, of a dark nature; it would outline this ankle bone itself, separating it from the lower tibia. In other words, there is narrowing of the joint; there is a loss of the normal cartilage that would support the bony parts, and we refer to those as degenerative processes taking place in the joint. The cartilage that normally separates the bone and leaves a little gap in the parts of the joint is absent. This second view shows the ankle, this was straight forward, this is with a 45 degree angle to the plate, and it just shows again the same changes as you see on this first view here, the straight AP view. Again you see the rounded mass where it must have been a comminuted fragment, and it is healed in; and another one here, that is by these markings here (indicating), and there is a well-healed fracture running down through in this

(Testimony of Dr. Max Mark Bocek.)

area here; you can see a little remnant of the little gapping. And this last view is a side view of the ankle taken with the ankle straight sideways, and it shows normal alignment between the ankle bone, the astragalus, this little bone here, and the heel bone down at the bottom here, and the tibia. However, this was put in proper position; however, it again shows lack of joint space. There is practically no gap between the large ankle bone and the tibia. You can see a [272] little gap here (indicating) showing that there is a cartilage lining the joint. Here, too, you can see a rarification in this area, another small one up here where some of these curettements have taken place, some loss of bony material there because it was infected and had to be removed to clear the infection.

Q. That was removed in one of your operations?

A. In one of them, yes, they were right in the same area.

Mr. Hudson: Would you just resume the chair, please, Doctor?

(Witness resumes the stand.)

Q. (By Mr. Hudson): What is your prognosis, Doctor, upon this injury?

A. Well, any joint that has been badly injured, as this one has, has usually developed a traumatic arthritis, a painful joint that remains. So, until further treatment is given, for instance, this joint will probably need an eventual fusion, eventual obliteration of the joint, so you would have fusion.

Q. By "fusion" what do you mean, Doctor?

(Testimony of Dr. Max Mark Bocek.)

A. That means that the joint that is still remaining, although it is narrowed, there is still a little motion, enough to cause pain. We go in and scrape that joint out completely so that the bone fragments will pass across so that it is healed solid and there is no motion [273] whatsoever. That is called fusion. If the joint is painful, so that they don't move, so that there is no motion present, then there is no pain.

Q. Even after the fusion, that will still present the possibility or probability of an arthritic condition?

A. No, that is why you do the fusion, to stop the process.

Q. So that will not be present?

A. That is right, you obliterate the joint.

Q. Is there any possibility, Doctor, of returning that ankle to its normal function?

A. Yes, if you have a successful fusion the ankle becomes painless and they are able to get along very well, with some limitations, of course, by lack of motion; but for ordinary walking on smooth surfaces, they get along very well.

Q. When or how long before such an operation could be contemplated, Doctor?

A. Well, in the presence of drainage you can't do it. Now that she is healed I would like to give her a period of 18 months to two years before we would tackle any surgery of that kind, if I were going to do it.

(Testimony of Dr. Max Mark Bocek.)

Q. In the event that osteomyelitis continues, what is the prognosis, then, on the limb?

Mr. Gavin: I will object to that, your Honor, because he hasn't established with any probability that it [274] will continue. I understood the Doctor to say that it is absent, it no longer exists.

The Court: I think he should be permitted to state the alternative of the repair by fusion. I will overrule the objection. You testified that it couldn't be done if the osteomyelitis came back?

A. It would be more likely to be doomed to failure than it is at present.

The Court: I see. All right, go ahead.

Q. (By Mr. Hudson): In the event the osteomyelitis were to recur, then what is to be done with the limb?

Mr. Gavin: I understand that you overruled my objection. My point is, of course, that when he says that "in the event that it recurs" that he has not established with any probability that it will recur, you see.

Mr. Hudson: I don't believe that is quite correct. I think that the Doctor has testified that you never know that it will not recur, but if it does not recur in the period of two years, you feel comparatively safe.

The Court: I understood his testimony to be that if it doesn't recur within a year and a half or a year or so that it is then reasonably probable but not altogether certain it won't recur.

Mr. Hudson: Yes, sir.

(Testimony of Dr. Max Mark Bocek.)

The Court: I will overrule the objection. [275]

Mr. Splawn: May I interpose the same objection on behalf of my clients and on the theory that there has been no testimony of the probability of osteomyelitis in any degree of reasonable medical certainty, in view of the Doctor's own testimony.

The Court: All right, overruled. You may proceed.

Q. (By Mr. Hudson): Do you recall the question, Doctor? A. No, I am afraid I don't.

Q. In the event osteomyelitis should recur in the limb within the next eighteen months to two years, then what has to be done with the limb?

A. Well, of course, you are thrown back to your original problem. You have to again go in and attempt to clean it out and obtain healing with the delay necessary.

Q. Now, if the osteomyelitis cannot be controlled by those methods, what is the eventual answer?

A. Well, it depends; some people go along all through life with a few draining sinuses and get along fairly well; others find it so incapacitating and with the recurrence of pain that they ask for amputation sometimes.

Q. There is no particular danger of complication in an amputation under those conditions?

A. Not usually.

Q. Doctor, referring to this particular area, when a [276] person sustains a compound comminuted fracture of an ankle caused by a fall in a fruit orchard in the Yakima Valley, do the methods

(Testimony of Dr. Max Mark Bocek.)

recognized and approved by those reasonably skilled in the medical profession in this community require the administration of a tetanus antitoxin shot?

The Court: Wait a minute before you answer that. [277]

* * * * *

The Court: Well, proceed. You ask him first, if he has an opinion, or he feels that he can express an opinion.

Q. (By Mr. Hudson): Doctor, do you have an opinion or do you feel that you can express an opinion of the requirements, or the recognized methods of individuals or professional men reasonably skilled in the medical profession in a circumstance such as this in the fall of 1955?

A. You mean for this community, or others, or where?

Q. Sir?

A. You mean, for this community, or for where I was trained? [278]

Q. In the Yakima Valley here?

A. I don't know whether I could give an opinion for the Fall of '55. I hadn't been here long enough to know what was the exact treatment they gave.

Q. I didn't understand you, Doctor?

A. I don't know whether I could give an opinion for the Fall of '55, because I had only been here two months or three months, because I didn't know what standard they had at that time, that is, among the general men; I just know my own standards, what I would do in regard to that sort of problem.

(Testimony of Dr. Max Mark Boeck.)

Q. Well, can you express your opinion as to your own standard, as to what you would require?

Mr. Gavin: I object to that.

Mr. Splawn: I would object to that, also.

The Court: I will sustain the objection.

Mr. Hudson: Pardon me, just a moment.

The Court: Yes, all right.

Mr. Hudson: You may examine.

Cross Examination

Q. (By Mr. Splawn): Did I not understand you, Doctor, to state in answer to counsel's question concerning the probability, looking at it at this juncture, of osteomyelitis developing [279] at the site of the fracture, what was your testimony in that regard? I may have misunderstood you, I thought you said that you could not say that it would develop, with any degree of medical certainty, or that it was not probable; that it was possible but not probable, am I mistaken in my impression of your testimony?

A. No, I think what I meant to say, I don't know how you got it, but it is quite probable to a certain percentage that certain ones will recur.

Q. Yes.

A. If there has ever been osteo, and it might recur a number of years later, as far as that goes.

Q. Well, I am not speaking of individual cases, but I am speaking of the balance of probabilities in all cases.

The Court: Of development or recurrence?

(Testimony of Dr. Max Mark Bocek.)

Mr. Splawn: Of the recurrence or development of osteomyelitis, coming again.

The Court: Is there a difference between development and recurrence, Doctor?

A. Yes.

The Court: I just wanted to make it clear what he is talking about.

Mr. Splawn: Thank you.

Q. What is your opinion along those lines?

A. Of recurrence? [280]

Q. Yes.

A. Well, they can recur and they do recur a lot of times, it's quite common, in fact.

Q. I see. What about the development of osteomyelitis at any other place in the body?

A. I wouldn't think that would be very probable.

Q. I see. A. It's possible, of course.

Q. Yes. When is it that you recommend fusion?

A. Oh, I would like to see the joint left alone the way it is, perfectly well-healed, for about two years.

Q. I see. Is there any indication in any way to indicate that osteomyelitis might recur?

A. I don't think I can answer that.

Q. I see. There is no signs of it, now?

A. No, there is no signs of either presence or absence.

Q. I see. It is not draining or the drainage is completely healed?

A. All I could see is the skin.

Q. I see. So far as the patient's symptoms are

(Testimony of Dr. Max Mark Bocek.)

concerned, if there are any symptoms relative to that condition, have there been any expressed recently? A. Because of the osteo?

Q. Yes.

A. Or because of the injury? Well, the only symptom of [281] osteo would be drainage and fever. She has had none of that.

Q. Drainage and fever is typical of osteomyelitis?

A. Of course, you can have chronic osteo with no fever but drainage.

Q. I take it at the present time there is no drainage? A. Not the last time I saw her.

Q. I see. Well, you used the term "completely healed," you are referring to the drainage, I suppose, in that?

A. Absolute signs of drainage, that is right.

Mr. Splawn: That is all.

Cross Examination

Q. (By Mr. Gavin): Are you through?

Mr. Splawn: Yes.

Q. (By Mr. Gavin): Doctor, everybody else seems to understand osteomyelitis, I am not sure that I do. What is osteomyelitis?

A. Well, pure and simple, it's infection in a bone.

Q. A bone infection? A. A bone infection.

Q. I see, and when this lady came to you for the first time, she had some infection present in this fracture site in her ankle where she had been hurt?

(Testimony of Dr. Max Mark Bocek.)

A. She did. [282]

Q. And your purpose, of course, was to remove that infection, if possible, before you did any further work upon it, is that right?

A. That is right.

Q. I take it that at least as we sit here today, you have been successful up to this point, the infection has now gone away and the area has healed?

A. It apparently has, yes.

Q. It may or may not drain again in the future?

A. That is right.

Q. That is something that lies in the future, I take it, whether it is going to recur or is not going to recur? A. One doesn't know.

Q. Well, the gentlemen of the jury are sitting here with the problem before them. Do you care to state whether, in your opinion, for their help, it is possible that this osteomyelitis will come back again or whether it is probable that she will get along for eighteen months or two years and it is gone?

A. Well, from past experience in seeing this type of case, I would say it's about a fifty-fifty chance of going either way.

Q. Oh, I see. You would be in the realm of guesswork, then, whether it is going to occur or is not going to occur? [283]

A. Unfortunately, I don't have a crystal ball.

Q. What?

A. Unfortunately, I can't foretell the future.

Q. It is my understanding if it is not going to

(Testimony of Dr. Max Mark Bocek.)

recur, then what should be done for this lady is to perform a fusion of the ankle joint?

A. Yes, I think it's indicated.

Mr. Gavin: The only reason that I am moving up here is that I didn't hear the Doctor too well.

The Court: I think it might be well for you to speak up a little more, Doctor. I think the jurors in the back are going to have a hard time hearing you. The acoustics are bad in this room.

Mr. Gavin: I think when he talks to me over there his voice goes out in this direction, so I will stand over here.

Q. You feel, then, that the thing to do for her, assuming no recurrence of this bone infection, would be to fuse or make solid this joint that has narrowed in the ankle? A. Yes, I do.

Q. And if that procedure is successful, Doctor, she should then have a pain-free foot?

A. Yes. If you have a good result, it's pain-free.

Q. We have heard Mrs. Wong here today, she complains that the foot is a painful foot. What your surgery or [284] procedure would seek to do is to remove that pain? A. That is correct.

Q. And assuming that this treatment of yours were a successful one, Doctor, do I understand then that she would be able to perform all of the normal functions, in the sense of being able to walk and use the foot, that assuming there is a limitation of motion, of course, that she has been able to do in the past?

(Testimony of Dr. Max Mark Bocek.)

A. They are usually able to walk quite well on smooth surfaces.

Q. She tells us that she is a lady who, in addition to being a housewife, has a profession in the ministry, she does religious work and, particularly, interprets for her husband from Chinese into English, I assume, going to various religious meetings, that is the type of work she has done. This procedure, if your course of treatment proves to be successful, is there any reason why she shouldn't continue on and do that work?

A. Coming out as we desire, if the outcome would be as we would want, a good result, why yes.

Q. Well, Doctor, again, do you care to give this jury the benefit of an opinion, and that is all they are going to have to go on, do you believe there is a reasonable probability that your treatment of this lady will be successful in the sense I just asked you about? [285]

A. Well, relating it to general experience that I have had, ankle fusions, about 60% are good results.

Q. Of the kind we talk about?

A. Ankle fusions, yes.

Mr. Hudson: I didn't hear the percentage?

The Court: About 60% are good, is that what you said?

A. Yes.

Q. (By Mr. Gavin): Well, are you able to help us in this case, Doctor, or these gentlemen, by projecting your opinion as to whether it is reasonably

(Testimony of Dr. Max Mark Bocek.)

probable that your course of treatment on this lady should prove to be successful?

A. You can't predict, really.

Q. You are unable to predict?

A. Because there are so many variables that come up in any treatment of that nature.

Q. At least, as of this time, with the infection gone away, you hope to follow out this course of treatment, do you not, Doctor?

A. That is our ultimate aim in the treatment, yes.

Q. Now, Doctor, this ankle that you see here, and as you show in your picture, Exhibit 18, is an ankle that has sustained a comminuted compound fracture, is that correct? [286] A. Yes.

Q. You not only see that from your X-rays, but you obtained a history of that sort of an injury, did you not? A. Yes.

Q. Is it a usual or uncommon thing, Doctor, in a compound comminuted fracture of the type this lady had, as she described it to you and as you see the evidences of it in your pictures, to find the development of some areas of drainage of the type you saw at the time you did?

A. Well, it is not unusual.

Q. Doctor, considering the nature of the injury, the area of injury in the ankle, a compound comminuted, the extent of it that you can detect from this picture and the history received of it, would you venture an opinion for us as to whether this lady, considering the nature of the injury she got,

(Testimony of Dr. Max Mark Bocek.)

the fracture she got, has had a poor, satisfactory, or good result?

Mr. Hudson: To which, if the Court please, we object.

The Court: I will overrule the objection. I think it goes to the extent of her injuries.

A. Well, up to date it has been poor, I would say.

Q. (By Mr. Gavin): Pardon me?

A. It has been poor, that is, the function.

Q. As of this time? [287]

A. Yes, that is right. [288]

* * * * *

Q. (By Mr. Gavin): Well, can you explain the basis of your conclusion then, Doctor, in this respect?

A. Well, it's an idealistic one that any time you treat a fracture you try to get as near to a normal result as you can. In other words, if you have a fracture, you try to get it back in as good a function as you can; a good result, or completely unsatisfactory, or a complete failure; in my mind that is the way I grade them.

Q. Then, that is the question I was asking, the basis of your comparison is that you are comparing it to a completely good result in a fracture, where you get back [289] the complete use and function of your foot as it was before?

A. Compared to an excellent result, yes.

Q. Now, in fractures of this kind, though, where they are compound and comminuted and appar-

(Testimony of Dr. Max Mark Bocek.)

ently as extensive as apparently you have described them from your pictures here, is it an unusual thing in treating this type of fracture for a lady such as Mrs. Wong to end up with results such as she now has?

Mr. Hudson: Now, if the Court please, that is asking the same question another way that he already elicited the information on from the Doctor, and I will object to it.

Mr. Gavin: Maybe fractures of this kind produce poor results.

The Court: I will overrule the objection.

Q. (By Mr. Gavin): Oh, all right, I see. Do you understand the question, Doctor?

A. Yes. In the presence of such severe damage, is this quite common to have this result? Yes, I think it is. If you injure a joint severely, as severely as that.

The Court: Is that all, then, Mr. Gavin?

Mr. Gavin: I think that is all.

The Court: All right, any redirect? [290]

Redirect Examination

Q. (By Mr. Hudson): Is it just as common, Doctor, that you get a good result in injuries such as this?

A. Well, I would say that to get what I regard as an excellent result, would be rare with such a severe injury.

Q. A good result would not be unusual?

A. Well, you can get a certain percentage of

(Testimony of Dr. Max Mark Bocek.)

good results, yes, and a certain percentage of poor.

Q. Now, Doctor, is it ordinary in a fracture of this nature that gas gangrene develops?

A. No, it is not usual.

Q. It is somewhat of a rarity, isn't it?

A. In my experience, it is rather rare.

Mr. Hudson: I believe that is all, Doctor.

The Court: Did you have any other questions?

Mr. Splawn: No questions.

Recross Examination

Q. (By Mr. Gavin): I have one, Doctor. Gas gangrene, is that the kind of condition that produces this pus drainage that we have heard about here?

A. No, gas gangrene is a very acute condition.

Q. I know, can the deep gas gangrene produce pus and drainage, that sort of thing; that isn't what gas gangrene [291] is, is it?

A. No, gas gangrene is a disease that produces an acute breakdown of tissue, degeneration of tissue, due to the compression of gas or exotoxins put out by the organism.

Q. The kind of pus or drainage that we have been talking about is not produced of a gas gangrene, is it?

A. No, it's secondary infection left in the bone.

Mr. Gavin: That is all.

Redirect Examination

Q. (By Mr. Hudson): Doctor, the condition

(Testimony of Dr. Max Mark Bocek.)

of the pus is the result of gas gangrene, is it not, of the osteomyelitis?

A. I don't think so, I think it's more of a secondary infection following.

Q. Secondary infection of gas gangrene?

A. A secondary infection of a different organism.

Q. Gas gangrene is extraneous, is it not?

A. That is true.

Q. It can be fatal? A. Yes.

Q. Is it usually fatal?

Mr. Gavin: Well, your Honor, I am sure nobody has died here. I think that is way off.

The Court: I will sustain the objection on that.

Mr. Hudson: I believe that is all. [292]

The Court: Any other questions?

Recross Examination

Q. (By Mr. Gavin): One more, in the light of what he has asked: Would the presence of gas gangrene infection in this case have any effect on the areas of osteomyelitis, such as this patient has?

A. Oh, it's possible because it could have, at the time it was present, could have caused tissue area, tissue breakdown.

Q. I am talking about at the time that you saw it, Doctor.

A. Well, it might be possible to speculate back and say that it was partially due to that, partially due to damage done at the time, although usually gas gangrene is an acute condition.

(Testimony of Dr. Max Mark Bocek.)

Q. That comes and is treated, and then goes, is that right? A. Yes.

Q. Would the surgeon or anyone else who was connected with this case at the time any gas gangrene occurred, be in a better position to give us an opinion, than looking at it as you are many months later?

A. The man who treated the thing, he would be better able to tell you what happened, I can't.

* * * * *

ROSE WONG

the plaintiff, recalled as a witness in her own behalf, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Gavin): Now, Mrs. Wong, I think that at the time we interrupted our testimony yesterday when I was questioning you, for Dr. Bocek, that we had been talking about the surgery that you had the first time that you went to Memorial Hospital the day of the accident. I think we got to the [296] point where you came to later in a hospital room in the hospital, is that right?

A. Yes, I did.

Q. The records which are, particularly No. 2 that we just had admitted here, indicate that after your first surgery you were in Room 208 at the hospital. Now, I don't know whether you remember that or not. Do you remember that?

A. I would have no way of knowing.

(Testimony of Rose Wong.)

Q. Do you remember that you were on the second floor, originally? A. Yes.

Q. All right. Now, Mrs. Wong, when is it that you first identified or became aware of the fact that Dr. Lugar, Leland Lugar, was the physician who had performed the surgery and treatment on you at the time on the day of the accident, in surgery?

Mr. Hudson: If the Court please, I object to that. There is no testimony so far that he did.

Mr. Gavin: Well, we would find out from the witness.

The Court: Well, your question assumes that he did. I think you should ask her whether he did or not.

Mr. Gavin: Well, I might call your attention, your Honor, to one of the documents in Exhibit 1, which is a report [297] of Dr. Lugar describing the surgery that he did in reducing a compound fracture to the lower one-third of the left tibia on 10/17/55. Now, that should be sufficient foundation, I think, for the question.

The Court: Well, you are asking her when she first became aware. It assumes that she did become aware, maybe that is a little technical.

Mr. Gavin: I think that is a good objection, your Honor.

Q. Did you become aware or were you advised at any time, Mrs. Wong, that a Dr. Leland Lugar had performed the surgery on you?

A. Yes, I became aware of it.

(Testimony of Rose Wong.)

Q. The point I am trying to get to is when did you become aware of that?

A. Dr. Lugar visited me in my room during the, that is, I can't tell you whether it was the second or third day that I was in the hospital.

Q. And did he talk to you about your surgery, is that how you found out?

A. No, sir, he didn't talk to me about the surgery.

Q. Well, you found out; how did you find out that he had done the surgery?

A. I have no concrete recollection of any specific words, I know I became aware of the Doctor's visits, or it is [298] a possibility Dr. Zimmerman mentioned it, I cannot remember exactly.

Q. I see. When did you first become aware of the fact that Dr. Lugar had any part in your case at all, Mrs. Wong? A. When he visited me.

Q. I see. I got the impression from your deposition that you had become aware that there was a man by the name of Lugar or at least a doctor whom you later recognized by his voice and appearance sooner than that, that you remembered this man talking as you came out of the anesthetic at the surgery?

A. No, sir, I don't remember anybody talking when I came out of the anesthetic.

Mr. Gavin: Well, pardon me just a moment, your Honor, so I can mark this point and find it.

Q. To refresh your recollection, Mrs. Wong, I am referring to page nine of your deposition that

(Testimony of Rose Wong.)

was taken in March of 1957, starting at line fifteen, do you remember these questions and answers:

“Q. When were you aware of the fact that Dr. Lugar had had anything to do with your case?

“A. I heard someone cursing when I went out from under the anesthesia. I did not know it was Dr. Lugar but after I saw him in my room I [299] knew it was the voice I had heard.”

A. Yes, when I went out under the anesthetic, not “from under.” I can’t go from under. There must have been an error in the transcription. I am sure I heard his voice that I recognized to be Dr. Lugar’s, later, and he was using words that were profane.

Q. And where was this, that is what we were getting at?

A. That was before I fell asleep under the anesthetic.

Q. I see, at the time of the first surgery?

A. Yes, sir.

Q. All right. Now, later, that would be in the surgery at Memorial Hospital, at the time you were taken there, would it?

A. You are speaking of October 17, sir?

Q. Yes, Mrs. Wong.

A. That is the first time we are talking about, yes, sir.

Q. Then later you saw Dr. Lugar on a number of occasions, did you not? A. Yes, I did.

Q. He visited you in connection with your treatment at the hospital? A. Yes, he did.

(Testimony of Rose Wong.)

Q. How often did he see you, Mrs. Wong, immediately following the first surgery?

A. There was no pattern to his visits. They were at [300] intervals, sometimes two, sometimes three days, or there might have been a time or so that he would have visited consecutive days.

Q. There may have been times, for example, when he, after this first surgery, when he may have visited you twice on the same day, too?

A. I have no memory of such an occasion.

Q. Are you testifying that that did not happen, or you just have no memory?

A. I can't remember if that happened.

Q. And it was definitely during the first week while you were on the second floor, following the first surgery, that you did understand or learn that he had performed the surgery on you following your accident?

A. Yes, sir.

Q. Now, there is no question, is there, in your mind, Mrs. Wong, that after the first week, I mean from the time you were admitted to the 24th, that he performed the second surgery?

A. No, sir, I think—may I make an explanation?

Q. Well, yes.

A. Up until the time they put the mask over my face it was Dr. Lugar in attendance.

Q. I see. Well, in other words, you have no reason to say that he did not perform the surgery?

A. That is true.

Q. And following that second surgery did Dr.

(Testimony of Rose Wong.)

Lugar continue to visit you in no regular pattern, of course, but did he visit you in connection with that surgery at the hospital at your room?

A. He visited me.

Q. And according to the record, I don't know whether you remember this, Mrs. Wong, but you were then in room 405, or on the fourth floor; do you remember being on the fourth floor?

A. Yes, sir.

Q. Did you remain there on the fourth floor throughout your stay then at the hospital?

A. Yes, sir.

Q. Now, there was a third, I guess, procedure performed on you, was there not, a third surgery sometime in November? A. Yes, sir.

Q. Now, you say you do not know whether that was performed by Dr. Lugar or a Dr. Brundage, is that what I understood you to say yesterday?

A. I don't recall we talked about that yesterday.

Q. I see. Well, in what context did you use the name Dr. Brundage?

A. I can't remember my exact words nor the question that was concerned, truly. I can't bring to mind the exact [302] question, sir.

Q. I see. Well, do you know who Dr. Brundage is? A. Yes, I do.

Q. Yes, Dr. Brundage is also a surgeon here in the community, is he not, in Yakima?

A. I understand he is, yes, sir.

Q. And there was a time was there not, Mrs.

(Testimony of Rose Wong.)

Wong, during the time you were in the Memorial Hospital when Dr. Lugar went on a trip to some convention, during that period of time in addition to Dr. Zimmerman seeing you, did Dr. Brundage? He saw you on at least a few occasions, isn't that right? A. Not at that time, sir.

Q. He never saw you while you were in Memorial Hospital?

A. Yes, he saw me, but not that I identify with the time that Dr. Lugar was out of town, sir.

Q. I see. When was the time, then, that Dr. Lugar was out of town?

A. I cannot tell you the exact date.

Q. Now, do you remember going to the surgery the third time? A. No, sir.

Q. And is that why you say you do not know who performed the surgery?

A. That is right, sir. [303]

Q. I see. All right, I think you told us yesterday that on the 24th day of October, that is, the week after the accident, you became aware or were told that you were being administered something called anti gas gangrene toxin?

A. Would you repeat that statement, please?

(Last question read.)

A. Yes, sir, I stated yesterday that they took a skin test at subsequent hours, what hour I don't know nor the lapse of time; they came in and told me they were administering anti gas gangrene.

The Court: Pardon me, just for the sake of clarity, by "they" you mean the hospital attend-

(Testimony of Rose Wong.)

ants? A. The nurses, yes, I am sorry.

The Court: All right, go ahead.

Q. (By Mr. Gavin): And following that do you recall that this same medication or drug was administered to you on other occasions?

A. I am not clear, sir, I remember the first injection.

Q. I see. Would you say that no other injections of this particular drug were made upon you at all, Mrs. Wong, while you were there?

A. I am not clear, no statement that I can remember was made to me.

Q. I see. But you do remember as you remained there at [304] the hospital that you were given medication of some kind almost every day, were you not? A. Yes.

Q. And these were normally given by the nurses, I assume? A. Yes, sir.

Q. Now, your hospital course ended at what time, do you remember, or perhaps I can tell here better for you. It says, "Date of Discharge, December 13, 1955, at 3:15 p.m."? A. Yes, sir.

Q. Yes. And then where did you go, Mrs. Wong?

A. I returned to our home, which was in the tenant house on the Swier farm.

Q. I see. Now, of course, you continued to receive treatment, did you not, during, or from that time forward? A. Yes, I did.

Q. You have told us about seeing Dr. Bocek and he has been here to describe the treatment he

(Testimony of Rose Wong.)

gave you, but you didn't see him for many months after your discharge, did you?

A. The first time I saw Dr. Bocek with regard to my injury was on the advice of Dr. Zimmerman.

Q. Yes, Dr. Zimmerman referred you to Dr. Bocek, did he not? A. Yes, sir. [305]

Q. But from the time that you were discharged from the hospital—strike that, pardon me.

Were there three times that you had surgery?

A. When, sir?

Q. At the hospital.

A. I was in surgery one, two, three, four times, sir.

Q. The fourth time, I think, was to change your cast, was it not? A. Yes, sir.

Q. And three times in which they did surgical work upon your leg? A. Yes, sir.

Q. All right. Now, following your discharge from the hospital it is true, is it not, that you were treated regularly, then, by Dr. Zimmerman, the defendant here? A. I was, sir.

Q. And that treatment continued up until when?

A. April, 1957.

Q. Yes. Now, you saw him, as I understand it, at varying times? A. I did.

Q. It might be as often on some occasions as what, every other day?

A. Not unless it was directly after surgery, sir.

Q. Well, there were occasions, I think, when you told us [306] you saw him as often as every other day in his offices out at Cowiche?

(Testimony of Rose Wong.)

A. After he took the walking cast off, the ankle broke out (indicating), that is, it swelled and discolored, and I went, as I remember it, every other day to have him look at it and advise me as to its care.

Q. What would be the longest period of time that would elapse in your seeing him for treatment after you returned to Cowiche between treatments?

A. Approximately four weeks, it might vary a day or so either way.

Q. I see. But it was regular calling for treatment from the time you got out until April of 1957?

A. Until April, I don't remember the exact date, yes, sir.

Q. And you continued, as a matter of fact, to go to Dr. Zimmerman for treatment, even after you instituted this lawsuit, did you not?

A. I am not sure if the lawsuit had been filed or not. I cannot tell you. [307]

* * * * *

Q. (By Mr. Gavin): And you continued to go to Dr. Zimmerman until April of 1957?

A. That is right, sir.

Q. You went for treatment then to Dr. Bocek to whom he recommended you, is that right?

A. Do you mean to tell me he recommended at that time and I accepted his recommendation?

Q. No, I mean to say that he had recommended Dr. Bocek to you, and you continued with Dr. Bocek.

(Testimony of Rose Wong.)

A. I had come to know Dr. Bocek and I then went to Dr. Bocek for treatment, yes, sir.

Q. Incidentally, do you have any physician or surgeon who treats you now at your home in Portland now on any regular basis? A. No, sir.

Q. I see. Well, even after this suit was instituted [308] against Dr. Zimmerman, is it not true, Mrs. Wong, that you told him on a number of occasions when you visited him that you had no complaint against him at all about his treatment of you or of the manner in which he cared for you?

A. I told Dr. Zimmerman that his care had been good with the exception of the neglect of administering tetanus anti gas gangrene, yes, sir.

Q. Well, that isn't quite it yet, you deny that you told him that you were completely satisfied with the treatment and care that he had given you on a number of occasions when you went to see him, even after you brought the lawsuit.

A. At each time that I visited with Dr. Zimmerman and talked to him about that, I mentioned specifically that I was not satisfied with the fact that I had not been given tetanus anti gas gangrene shots.

Q. Well, I understand you to say that, but my question is this, Mrs. Wong: Do you deny that you told Dr. Zimmerman, without any qualifications, on a number of occasions as he treated and cared for you, that you had absolutely no complaint about the way he treated and cared for you?

A. Yes, I deny that.

(Testimony of Rose Wong.)

Q. Did you continue, for example, Mrs. Wong, while you were [309] in his care and even after you brought this lawsuit, to take your family to him for treatment?

A. My son went to Dr. Zimmerman on one injury. He called from the school and the school is opposite Dr. Zimmerman's office. He had fallen playing basketball, and he went to his office to have the stitches taken.

Q. Do you deny that any of your other children went to him at your request and at your suggestion for treatment?

A. I have no recollection of my children going.

Q. I see. You would say that they did not?

A. They did not, as far as I took them, I never took them, no, sir.

Q. Now, incidentally, did you ever visit Dr. Lugar in his offices in Yakima?

A. I visited him on the advice of Dr. Zimmerman once.

Q. I see, do you remember when that was?

A. I can't tell you the date but I can tell you the circumstance.

Q. No, I am wondering about the date, Mrs. Wong.

A. Just a moment, I can just about give it to you. [310]

* * * * *

Q. This would refresh your recollection as to an office visit you made to Dr. Lugar?

A. Yes, sir.

(Testimony of Rose Wong.)

Q. It is a bill of his for \$5.00, dated June 1st, 1956 (hands paper to witness)?

A. Yes, sir.

Q. Well, by refreshing your recollection, then, Mrs. Wong, can you tell us when would be the only date, I assume, about when you made an office visit or paid an office call to Dr. Lugar?

A. Yes, it was between April 26 and May 3rd, thereabouts.

Q. 1956? A. Yes, sir.

Q. I see. Well, now, as a matter of fact didn't your relationships with Dr. Zimmerman continue on such a friendly basis that you even went to the extent of sending him a postcard when you took a vacation trip one time, a friendly postcard?

A. I advised Dr. Zimmerman I was going to visit my sister in Denver, Colorado, and had to wait—well, I don't remember, but a space of time until he thought the surgery which he had performed was sufficiently healed that it was safe for me to go; and upon having his permission to go, he said, "Mrs. Wong, don't do any [311] skiing." When I arrived in Colorado it was wintertime and I have a sense of humor, so I picked up a card and it was a picture of people skiing, and I said, "Send it to Dr. Zimmerman."

Q. I am glad you have a sense of humor, but that would be an example of the friendly relations that you maintained with Dr. Zimmerman, would it not?

A. If you choose to call it that, yes, sir.

(Testimony of Rose Wong.)

Q. You mentioned, for example, seeing a Dr. Lowell? A. Yes.

Q. That is his name, Noall or Nowell?

A. I believe they call it Noall.

Q. That is when you were making a trip to Portland, was it, after this accident, or after you had been out at Cowiche?

A. The first time I visited Dr. Noall I was advised by Dr. Zimmerman, I had other business in Portland at the time, and he said it would be well if I would call at his office for an examination.

Q. I see, and you followed Dr. Zimmerman's advice and recommendation in that respect, did you?

A. Yes, sir, I went. [312]

* * * * *

Cross Examination—(Continued)

Q. (By Mr. Splawn): Directing your attention, Mrs. Wong, to your testimony yesterday wherein you indicated that you had been unemployed and non-earning since the date of the accident, I ask you this, as of last November, November, 1957, is it not a fact that you were having Bible study in your home, 20 to 30 people present each Wednesday and Thursday, and that you were taking regular services at the Open Bible Church in Portland?

A. No, sir, we were not taking regular services, we did have Bible study, do have Bible study at our home, yes, sir.

Q. Well, then, that was a part of your Gospel work, I assume?

A. That was not employment, no, sir. [313]

(Testimony of Rose Wong.)

Q. Was that the usual kind of Gospel work you had been doing prior to the accident, that is, having a number of people at your home or some other place, and doing Bible study?

A. No, sir, upon going to Portland we had a Bible study group. They do not employ us, we receive no remuneration for those services, and it is not employment. They gather around the table, I sit down, once a week. Referring to the other statement there, the pastor of that particular church had been out of town; we filled in on Thursday night and one Sunday night; the Thursday night might have been two or three——

Q. (Interposing): In other words, you were not having regular Bible study in your home, but only fill-in?

A. No, I did not say that, sir. I said we had Bible study every Thursday night at our home, yes, sir.

Q. I see. What I am getting at was that that is continuing up to the present time, is it?

A. Yes, we do.

Q. Well, is that the kind of work that you had been doing prior to the accident?

A. No, sir, we had never had Bible study in our home prior to the accident.

Q. I see. Now, when you talk about silver offering, I think you mentioned yesterday, I mean the way you became [314] compensated for your work when you were doing it before the accident, as you testified, it was by way of silver offering?

(Testimony of Rose Wong.)

A. I used no such words.

Q. Well, I mean it was contributions, apparently, that you received?

A. I received contributions, yes, sir.

Q. Yes; so, incidentally, since the accident, over what period of time have you been having these Bible study groups at your home?

A. From about the middle of September to the present time.

Q. I see, and it is your testimony that you received nothing from these people who attend your Bible study? A. That is correct, sir.

Q. Now, so far as taking regular services at the Open Bible Church in Portland, has that been irregular or occasional?

A. We have not been there for some months, sir.

Q. Well, last November, for example, or prior to last November, were you and your husband taking regular services at the Open Bible Church?

A. Regular Bible study for two or three weeks. I think the sum and total of those Bible studies were four times, sir.

Q. I see, and was there any compensation derived from that, [315] for example, as you had before the date of the accident?

A. One offering, sir.

Q. I see. Now, did you last November, with respect to regular services at the Open Bible Church in Portland, indicate to anyone that it was your desire then to permanently take on these meetings and continue them? A. No, sir.

(Testimony of Rose Wong.)

Q. Did you have any opportunity offered you last fall to take on regular services at this particular church on a permanent basis?

Mr. Hudson: If the Court please, I would like to object to that last question at the present time. We are not asking for loss of wages. I don't believe that it is pertinent, I don't believe that it is relative.

Mr. Splawn: It is her capacity, your Honor.

The Court: Yes, I think it has a probative value, perhaps, on the question of loss of earning capacity, and I will overrule the objection on that ground.

Mr. Hudson: Yes, sir.

Q. (By Mr. Splawn): Did you not write Mrs. Swier as late as November 5, 1957, and state to her in the letter that they, referring to the Open Bible Church at Portland, "would very much like for us to permanently take these meetings"?

A. What meetings? [316]

Q. Regular services at the Open Bible Church.

A. No, sir, they were not regular services, sir.

Q. Did you write Mrs. Swier that these services were regular services at this church?

A. I cannot remember the context of my letter, I have never been invited to take regular services at the Open Bible of Portland.

Mr. Splawn: Well, your Honor please—

The Court: Do you wish to have that marked?

Mr. Splawn: May I have this identified?

(Whereupon, Defendants' Exhibit No. 19 was marked for identification.)

The Court: 19?

(Testimony of Rose Wong.)

Q. (By Mr. Splawn): I hand you, Mrs. Wong, what is denominated Defendants' Identification No. 19 and ask you if you recognize that as a letter written by you to someone (hands paper to witness)? A. Yes, it was written by me.

Q. And it was written to whom?

A. "Dear Sister Swier."

Q. I see, and you wrote the letter and mailed it to her, I assume?

A. I mailed it to her, I wrote it.

Q. Now, will you refer to the first page of the letter. [317]

* * * * *

Q. (By Mr. Splawn): In respect to your income as you testified that it was before receiving your injury did you and/or your husband ever make income tax returns on it?

A. Yes, we did. [318]

* * * * *

Redirect Examination

Q. (By Mr. Hudson): What type of farm were you raised on, Mrs. Wong?

A. I beg your pardon?

Q. What type of farm were you raised on?

A. Well, it was a pioneer farm, irrigated.

Q. It was not a fruit farm?

A. No, sir.

Q. There were not commercially grown apples, pears and cherries? A. No, sir.

Q. You had no experience in your childhood with apple orchards, pear orchards or cherry or-

(Testimony of Rose Wong.)

chards? A. In my childhood, no, sir.

Q. We were speaking about yesterday's testimony, about an orderly, in yesterday's testimony. Do you know that that orderly was not either Dr. Zimmerman or Dr. Lugar? A. Yes, I do.

Q. How do you know that?

A. I know his name.

Q. The orderly's? A. Yes, sir.

Q. What is it? A. George. [321]

Q. Who?

A. George, they called him "George."

Q. Now, this morning you testified to the fact that you had no memory of going to surgery the third time? A. Yes, sir.

Q. Will you tell me why you had no memory of it?

A. I was put to sleep before I was taken to surgery.

Q. In other words, you were under anesthetic prior to leaving your room?

A. They had given me capsules that had put me to sleep, yes, sir.

Q. That is the reason you don't remember going there, you know that you were going and you know that you had been there, eventually?

A. Yes, sir. [322]

* * * * *

WALTER SWIER

the defendant, recalled as a witness in his own behalf, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. Splawn): You are Walter Swier?

A. Yes.

Q. One of the defendants left in the case?

A. Yes.

Q. Walter, how many acres in orchard do you have, or did [410] you have in October, 1955?

A. Twenty acres bearing.

Q. The particular ladder, which is Defendants' Exhibit 1, in what type of storage, if any, has it been?

A. Well, for over two years it has been in dry storage.

Q. Yesterday did you hear the testimony of the plaintiff, Rose Wong, as to the ground on which she set the ladder at the tree in question?

A. I did.

Q. With respect to the actual ground, tell us where the accident occurred; at that tree did that description fit the actual condition as it existed during the fall or the apple-picking season in 1955?

A. Yes, sir.

Q. Did you bring to court three cases of ground or earth? A. Yes, sir.

Q. And what similarity, if any, is there between what you have brought into court and the plaintiff's own description yesterday of the ground on which she set the ladder?

(Testimony of Walter Swier.)

* * * * *

A. The ground is identical. [411]

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CECIL C. CLARK

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Splawn): Your name is Cecil C. Clark? A. That is right.

Q. Where do you reside?

A. Lombard Loop, that is Route 2, Wapato.

Q. What is your occupation?

A. Fruit Grower. [419]

Q. What has been your experience in that field, and also, relative to three-legged ladders for fruit picking purposes, will you give in detail your background experience in those respects?

A. Well, I suppose you would start with the fact that I was born in an orchard out here on South Knob Hill. I am 62 years old now and I was practically raised on an orchard. I started fruit growing on my own at eighteen and all but four years since then I have been associated with orchards and the handling of ladders. I was making a hasty estimate this morning of, perhaps, the time that I had spent on a ladder, and I have come up with something like ten thousand hours actually working on a ladder myself.

Q. Do you own your own farm?

A. Yes, I have something in excess of 200 acres

(Testimony of Cecil C. Clark.)

of orchard and, incidentally, I have 321 ladders at the present time. In addition to that, about my familiarity with ladders, I might say that I have in the past borrowed lots of ladders and I would estimate at least a thousand or more.

Mr. Hudson: I didn't understand that.

A. I have borrowed at least a thousand or more ladders during my operation, from other orchardists, because I didn't have enough at times. [420]

Q. (By Mr. Splawn): The area where your orchards are located you indicated was the Lombard Loop area, and where is that in the Yakima Valley?

A. Well, that takes off of Highway 410 at Sawyer, which is 14 miles down 410 from Yakima.

Mr. Hudson: Would you locate that as to where it is with reference to Cowiche?

Q. (By Mr. Splawn): About how far; you know where Cowiche is, do you not?

A. Well, it's pretty near as far the other side as Cowiche is from Yakima.

Q. And are your orchards located in what is commonly called the Yakima Valley?

A. Oh, yes.

Q. Now, in addition to the experience which you have referred to, what offices or directorships or memberships have you held or now hold in agricultural organizations or in agricultural activities, or anything having to do with that?

A. Well, that is quite a list. At the present time I am a member of the board of the Washington

(Testimony of Cecil C. Clark.)

Cannors Co-op, which has a cannery here in Yakima.

Q. Incidentally, are you a member of the Washington State Legislature?

A. Yes, I am. [421]

Q. And have been for how many sessions?

A. Three sessions.

Q. And are presently a member of the Washington State Legislature? A. Yes.

Q. And what committees did you serve on in that respect?

A. Well, my first session there I was chairman of the Horticultural Committee and was on Taxation and Revenue, Industrial Insurance, Reclamation and Agriculture. The second session they did away with the Horticultural Committee and I was on Agriculture, and no Republicans had any chairmanships at that time, so I didn't have a chairmanship, so I was on Revenue and Taxation and Reclamation again; oh, right offhand I don't remember. They were not important committees. Last session I was on Revenue and Taxation, Reclamation, again Agriculture, and Institutions.

Q. Now, are you connected or have you been connected in any way with the Washington Freestone Peach Association?

A. Yes, sir, I helped organize it and was the president of it for two years. The same things happened about the Pear Association; two years before that I helped organize that and was head of that for two years. I am, also, president of the Wash-

(Testimony of Cecil C. Clark.)

ington State Reclamation Association at this time. Now, do you want a list of [422] some of the things I have been into in the past?

Q. Yes, I mean along the lines which I have indicated, Mr. Clark, to indicate your background.

A. Well, I can't give you the exact years without referring to them, but I was president of the Washington State Horticultural Association, I think that was 1952, somewhere back in there. I have a citation of merit as a special award from the Washington State College for services rendered to horticulture. I have a special citation of merit given to me this winter signed by the Pear Association and Peach Association, of the Bargaining Association.

Q. Is that Washington State?

A. Yes, the one that I was president of. The Washington State Fruit Commission and the Washington State Apple Commission, listing out my services to horticulture, and it was a thing I appreciated very much. For about four years before I was elected to the Legislature I was chairman, or not chairman, excuse me, I was a member of the Special Farm Labor Committee that was advisory to the National Farm Labor Committee that was advisable to the Secretary of Agriculture in Washington. And on that committee I was on a special subcommittee on Mexican Nationals, representing the five northwest states, and in the course of that duty I made a number [423] of trips to Washington, D. C. on farm labor matters. I was also chair-

(Testimony of Cecil C. Clark.)

man of the Farm Labor Committee that was organized here when the Korean War started, which didn't function very much because we didn't need it, but I was a member of the Yakima Valley Food for Victory Committee all during the Second World War, and one of our jobs was to bring in Mexican Nationals and handle them.

The Court: Pardon me, I am reluctant to interfere, but we have a definite time limit in these cases. I would like to finish this case this week if we can. You are qualifying this man as an expert on ladders, aren't you?

Mr. Splawn: No, just his background so the jury can evaluate him as a man who has been in business and knows ladders.

The Court: Well, as I say, you are qualifying him as an expert on ladders. I think his testimony should be confined to something that has some remote knowledge of ladders and some bearing upon ladders. I don't mind his listing this, I am sorry to cut it off, but in the interests of time I think he should be a little bit brief about it.

Mr. Splawn: Thank you.

Q. Now, Mr. Clark, do you recognize a particular ladder in the courtroom?

A. Yes, I have seen it before. [424]

Q. That ladder, for your information, is marked Defendants' Exhibit 1, and you have seen that ladder before? A. That is right.

Q. And do you remember the place where you saw it?

(Testimony of Cecil C. Clark.)

A. Yes, over at the Dependable Ladder Factory where that ladder was originally made.

Q. I see. And has that been sometime this year?

A. Oh, it was within the last two or three weeks.

Q. I see. While there, did you make any tests on the ladder?

A. Yes, I looked it over and I set it up and climbed it.

Q. Do you have any familiarity, from your experience as you have referred to it, with ladders in common use in the Yakima Valley?

Mr. Hudson: Now, if the Court please, Mr. Clark is about to commence testifying as an expert. I don't question that he is a very fine man, but up to the present time he has not qualified or has not been qualified to express an expert opinion about ladders. He owns 300-odd of them. He has spent ten thousand hours on them, he has borrowed a thousand of them, but up until the present time he is not qualified to express an opinion about a ladder, except as he recognizes it. I have driven automobiles since 1911, but I am not an automobile expert. To qualify this gentleman as an expert on ladders, he has got to show a lot more [425] than having used them. His physical makeup, his agility, all those things might enter into what would be a safe ladder for him and not safe for me, and I think he is not entitled to express an expert opinion.

The Court: Well, I will overrule the objection. I think that his qualifications are a matter for the

(Testimony of Cecil C. Clark.)

jury. It will go to the weight rather than the admissibility.

Q. (By Mr. Splawn): Mr. Clark, what familiarity, if any, have you gained through the years and up to the present time of ladders in common use for apple picking purposes in the Yakima Valley?

A. Well, my various associations with the things I have listed have brought me in contact with many growers and I have been on many growers' places and observed a great many ladders besides those I have borrowed and used of my own.

Q. Now, having inspected this ladder and tested it as you have indicated, state whether or not this ladder with all its aspects and features and its condition, and I assume you observed those, did you?

A. Yes, sir.

Q. Will you state whether or not, as it now stands, it is a ladder in common use in the Yakima Valley?

Mr. Hudson: Just a minute, Mr. Clark, I object to that question. There is a difference in the thousand ladders [426] in common use around here. It is this particular ladder; it isn't some other ladder, it isn't a group of ladders. No one can express an opinion as to a thousand other ladders around here. He can't discuss a comparison between this and a thousand other ladders in the valley. It's a question of whether his opinion is correct or not.

Mr. Splawn: I think that is for the jury to determine. In other words, it would be physically im-

(Testimony of Cecil C. Clark.)

possible for any human being to know all the ladders but certainly, of course, in our societies we get general representation.

The Court: I will overrule the objection, he may answer.

(Last question read.)

A. Can I ask you a question? Do you mean how it compares with other ladders?

Q. (By Mr. Splawn): In common use in the Yakima Valley. A. Yes.

The Court: Yes, he doesn't mean whether this ladder is in common use, but whether it is the kind of ladder that is in common use?

Mr. Splawn: I am including all of the features of this ladder.

The Court: Yes, I understand.

A. Well, in the first place, there is more of that kind of ladder used in the Yakima Valley than any other kind. [427] More of my ladders are of that make than any other five or six varieties that I have.

Mr. Hudson: Pardon me, Mr. Clark, you are referring to the brand?

A. Yes, and as far as the condition of the ladder, it's much better than the average ladder that is given to a picker in the Yakima Valley.

Q. (By Mr. Splawn): And when you refer to the condition of that ladder you are referring to all aspects of it, are you?

A. All aspects, just the way it stands there.

(Testimony of Cecil C. Clark.)

Q. And in your testing of the ladder you found that the tongue has some play in it?

A. Oh, it has a little play which is, perhaps—it is not detrimental, a little play there is beneficial.

Q. And the reason for that is what?

A. A ladder that is too rigid is more prone to tip than one that has a little give to it.

Q. Now, in your testing of this particular ladder, describe as you recall, Mr. Clark, what you did when you went over the ladder and tested it?

A. Well, I checked the steps to see if they were tight. They were. I wiggled the tongue to see what the condition of that was, and it was satisfactory, so I set it up and climbed it and went to the eighth step, wiggled [428] it and shook it all the way up, and it was perfectly safe to use, and if you put it on a tree, I will go to the top, the tenth step. I have got a little too much claustrophobia, or something, in the open air to go beyond the eighth step, but it is perfectly safe to go to the top step and work on it.

Q. Now, so far as static weight is concerned, and by that I mean just standing on any rung of the ladder up to and including the last rung before the very top, with no impacting of the ladder, no shaking, no jerking, no reaching to one side or the other, but dead-weight, is there anything about that ladder that could conceivably cause it to tip over or collapse?

A. No, there is nothing about the ladder. A picker on that ladder to fall has got to do one of

(Testimony of Cecil C. Clark.)

two things; first, is to either improperly place the ladder, set it up wrong, or else lean too far out; and with the numerous falls I have had on my place and with the ones I have made myself—I have fallen off a ladder a number of times just simply because of reaching out too far to get the last fruit and didn't want to get down and move it, just reaching out too far, that is what pretty nearly always makes a ladder tip over, unless it's improperly set up. [429]

* * * * *

Q. Above the sixth rung, Mr. Clark, that is taking the ladder above the sixth rung, that is standing on it at any rung above the sixth rung, is there any difference in that that you can see or that actually exists to make it unsafe for apple picking purposes?

A. Not as far as this ladder is concerned. Of course, the higher you go on any ladder, the easier it is to overbalance it by leaning.

Q. Is that a ladder condition or is that a picker maneuvering?

A. Well, that is a picker maneuver.

Q. Now, the higher you go on this ladder, and so far as any play is concerned in the tongue assembly at the [430] top, what is the effect as you take weight up the ladder, so far as that condition is concerned?

A. Any condition with the top of that ladder would make no difference on any step on it clear to the tenth. As I said, I would not hesitate if it was in a tree, to get on the top step and pick a prune, or

(Testimony of Cecil C. Clark.)

any other thing. Of course, I wouldn't want to lean way out across the tree, I would have to use some judgment about handling myself on it.

Q. Now, among the ladders, for example, which you have borrowed and you yourself own, do you have any ladder such as that in that condition, such as you found the condition of that ladder to be in all respects?

A. Yes, I don't see anything wrong with that ladder.

Q. What about your own?

A. I have some that need repairing, always do, and we repair quite a few of them, but I would not bother to repair a ladder like that because it doesn't need it, there is nothing to do on it. If I was hiring out to somebody to pick fruit——

The Court: (Interposing) Just a moment, there hasn't been any question asked. Let's proceed by question and answer.

Q. (By Mr. Splawn): Yes, do you have some further explanation concerning that ladder and its safety for apple [431] picking purposes?

A. Yes, sir. If I went to somebody's orchard to pick apples, and I have done it in the last few years to help out when pickers were short and I didn't have work of my own, and was given a ladder like that I would be perfectly satisfied with it and would go ahead and pick without any question whatsoever.

Q. And that is including the condition at the top?

(Testimony of Cecil C. Clark.)

A. That ladder as it is right there now.

Q. I see. Now, we don't have any ground on which to set it, Mr. Clark. We could wire the legs to the tongue to keep it from slipping because of the floor. Would that give any stability to the ladder to climb up and use, just to climb up and use.

A. Yes, that would keep the thing from slipping on the carpet all right. I would say, even so, your condition would be worse in here than it would be out on the ground.

Q. Yes. Now, with respect to the sides of that ladder, can you push in one side and cramp the ladder?

A. Well, yes, when there is nobody on it, sure; but when there is somebody standing on it, why, it would be more difficult.

Q. What can you do with a brand new ladder so far as doing the very same thing? [432]

A. Well, you can push a new ladder around sideways. I don't see that a new ladder would be any better than this one to pick up. In some respects it wouldn't be as good. When we get new ladders we are always happy after they are conditioned in a while, because they are a little too rigid, and they need to have a little bit of flexibility in the top. The fact of the matter is, when you tighten a ladder up and get the top all tight and everything tight, it's more liable to tip over than one that will give a little bit (indicating), not simply because if the picker leans a little bit, instead of the ladder giving a little bit, it just starts to twist, and over

(Testimony of Cecil C. Clark.)

it will go. So that a ladder with a little bit of play in the top is a safer ladder than one that is absolutely rigid.

Q. Now, if you were standing on any rung of that ladder, including the last rung at the top, with the exception of the top platform——

A. (Interposing): You mean the ninth one?

Q. Yes, any one of the first nine, and I will include the top, which has been termed a platform; I will include every rung and the very top of the ladder. If you are standing on any one of those places and not reaching out too far or not overbalanced, is there any action that can possibly take place in that ladder anywhere, [433] including any action at the very top and the assembly at the top, which would cause the ladder to tip, collapse, fall to one side, or to move in any direction?

A. No, not if it is properly set up.

Q. If it is properly set?

A. Of course, if you have got it set off-balance, why then, that is, of course, the picker's job to set it. If you have got the ladder set off-balance, why then any movement would cause it to go down.

Q. Is that only true of used ladders, or is that also true of brand new ladders that have been first set up after they arrived from the store?

A. That is true of brand new ladders as well.

Q. Assuming that that particular ladder has been in dry storage for over two years, what did you discover when you inspected the ladder recently, concerning its tightness, in view of the fact

(Testimony of Cecil C. Clark.)

that it had been actually in dry storage; assume it to have been in dry storage for over two years?

A. Well, it was tight everywhere. There was not excess movement in the top, and it was in first-class condition and satisfactory to pick on.

Mr. Splawn: Your witness. Oh, I had one more question, counsel. I am sorry, Judge; if I may?

The Court: Yes. [434]

Q. (By Mr. Splawn): Assuming these facts: The ladder was set solidly on disked ground and the tongue was centered and placed properly, and a picker was standing on the, it would be the eighth rung from the bottom, and not climbing up or down or moving the feet but turning slightly to the right while so positioned in order to ease off the picking bag approximately half full of Delicious apples from the trim of the ladder; if that were so, can that ladder conceivably tip, collapse or move in any direction?

A. Now, let me review that a little bit, so I can get the essence of that rather long question.

Q. If the ladder is properly set and solidly set on disked ground.

A. And then the picker is on the eighth step with a partly full bag of apples?

Q. Yes, half full, approximately.

A. And then turns slightly to come down?

Q. No, hasn't yet come down, but was about to come down, and both feet still resting on the eighth rung; neither foot was taken off to come down, but turning the body slightly to the right ready to come down.

(Testimony of Cecil C. Clark.)

A. And not leaning out to pick apples?

Q. Not leaning out to pick apples in any direction.

A. The ladder should not move any at all. It couldn't [435] collapse, it couldn't twist, it couldn't do anything.

Q. We are referring to this ladder, are we not?

A. Yes.

Q. If the ladder did tip, then what could only be the cause for its tipping or collapsing or going to one side or the other?

A. Now, we are assuming that it is properly set?

Q. Yes.

A. The only thing that could cause it to tip, then, would be leaning too far, reaching for those two or three apples that you ought to reset the ladder to get and you just don't want to do it, and so you reach just a little too far, and then once it starts, if you throw it off balance by shifting your weight too far, then you can't unless you have got a tray to grab, or something, you can't straighten it up, but with normal procedure of turning and moving around, you have to turn a certain amount to bring your bag of apples down, because you can't bring them straight down in front of you. It's done millions of times, and there would be no reason in the world why you couldn't turn with a full bag of apples, a full boxful, and bring them down without any movement or trouble of the ladder whatsoever.

(Testimony of Cecil C. Clark.)

Q. And that is including the play with this tongue it has in the assembly at the top, is that right? [436]

A. Yes, sir, that last just the way it stands there now.

Mr. Splawn: That is all.

Cross Examination

Q. (By Mr. Hudson): I rather got the impression, Mr. Clark, that this particular ladder couldn't be tipped over, from your testimony?

A. I didn't say that; I said that it could only be tipped over by improper setting or by leaning too far.

Q. I have always got the impression that a yoke in the condition that this yoke is in is a better situation than a properly manufactured yoke, is that right?

A. Well, I didn't say that was properly manufactured, sir.

Q. Do you know that, have you looked at it?

A. Yes, sir.

Q. And you think that that is a properly assembled yoke? A. I certainly do.

Q. And if you were building ladders you would build a yoke like that?

A. Well, I built 75 and we patterned them after it.

Q. That isn't what I asked you.

A. Yes, I would build like that; we did build them like that as near as we could.

(Testimony of Cecil C. Clark.)

Q. That is the way you like them? [437]

A. Yes.

Q. You would have it engineered that way?

A. Well, now, just a minute. When I build ladders I don't hire an engineer.

Q. Well, but by plan, scheme and design, you would have your yoke just the way that yoke is, is that right?

A. Very similar to it.

Q. Not very similar; you would have it that way?

A. I would have that style, yes. I probably wouldn't have the same dimensions exactly, but it would be that same type of thing exactly.

Q. And you would have the holes in the yoke and in the side pieces the same way that those are?

A. I didn't quite hear that?

Q. And you would have the holes in the yoke and in the side pieces where it connects through with the bolts on each side the same as those are?

A. Yes.

Q. Did you ever look at that? A. Yes, sir.

Q. And you are qualified here as an expert and you want to say and have this jury believe that if you were planning this you would build it that way?

A. Well, when it is first built there would be a little less play in it, but that play develops as you use them [438] and it is no harm; in fact, as I said before, if I were using it myself, I would rather have a little play there.

(Testimony of Cecil C. Clark.)

(Whereupon, counsel Hudson brought the ladder forward to the jury box.)

Q. I wish you would step down here, if you would, Mr. Clark; possibly if you would stand over here, so the jury can see. Now, this is not the yoke that this ladder came equipped with, is it?

A. I think so.

Q. Hasn't this new yoke or repaired yoke been put on there?

A. No, I think what has happened here is that this is another tongue that has been put in because apparently it has had a bolt here and another bolt there. I don't know what has happened, but that would be my assumption, that this is a repaired tongue put in here, it is not the original tongue that was in it, it shows this original opening here (indicating).

Mr. Hudson: Mr. Mullins and Miss Alice, would you step here, please? I would like a recess, your Honor; that is, I would like the jury to be absent.

The Court: Yes, all right, the jury may step out for a recess.

(Whereupon, the jury retired from the courtroom.)

Mr. Hudson: If the Court please, I would like to [439] be sworn.

The Court: Very well, the Clerk may swear you.

The Witness: What do I do?

The Court: You just step aside.

(Witness Withdrawn.)

THOMAS HUDSON

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Statement

Mr. Hudson: My name is Thomas K. Hudson. I reside in Denver, Colorado. My occupation is that of a lawyer. I am admitted to practice in all the courts in that State and the Federal courts. I came to Yakima and I can't give the exact date, but I believe that my associate, Miss Loveland, can supply it. I went with her and Mr. George Mullins to the Dependable Ladder Company where we were shown this ladder. At the time we were there I took a steel rule and I measured the bolts and the top assembly of that ladder, by that I refer to the bolts which connect the yoke to the side pieces. At that time there was three-sixteenths inches of lateral movement in the bolts. At the present time those bolts are tight and there are new washers in there.

I want to express my own opinion and my professional [440] integrity that those bolts have been tightened up since we saw it, and I would like to call Miss Loveland.

The Court: Well, I don't know what you have in mind, Mr. Hudson.

Mr. Hudson: I have this in mind, your Honor—

The Court: The jury is the trier of the facts and I can't decide any fact as to whether the ladder is now in the same condition as it was when the plaintiff fell from it or not, so that I don't think we

(Statement of Thomas Hudson.)

are accomplishing anything unless you wish to put this testimony on before the jury and for the jury's evaluation.

Mr. Hudson: If the Court please, my purpose in giving this testimony now is that I don't want counsel or someone else to shout "Surprise." That is what I am going to testify to before this jury and I am sure that Miss Loveland is going to testify to the same thing, and Mr. Mullins is, that we will take the stand and testify that that ladder has been tampered with.

The Court: I think that in view of the unusual situation here, I know in the State court there is a rule here, I am not aware of any formal, printed rule in this court, that an attorney who takes the witness stand may not then argue the case before the jury without special permission of the Court. Now, of course, I am trying a diversity case and it may be that that rule carries over here; there [441] isn't any formal Federal Court rule but, if so, I think in view of the situation here, since you are the only one who testified, that counsel may testify and have the Court's permission to address the jury.

Mr. Hudson: Thank you, your Honor.

The Court: Let's see, I suppose we may as well take our ten minute recess now.

(Whereupon, a recess was taken for a period of ten minutes.)

(Witness excused.)

(Whereupon, the following proceedings occurred in chambers.)

Mr. Hudson: Judge, now I am at a total loss. I know that that ladder has been tampered with. It is not in the condition it was when we examined it in March. It isn't in the condition it was when we saw it a few days ago. As a matter of information to the Court, I indulge in manufacturing as one of the things I am interested in. I am mechanically conscious. Now, when I was out there I measured the gaps with the steel rule that I borrowed from one of the men out there. Those bolts were readily turnable with your fingers. There are two totally new washers in there now on one side, and two old ones on the other side. Now, I can't use that ladder in its present shape for the same type of examination I could have before it was tampered with. There [442] is no way for me to examine these witnesses that way.

Now, I have been dying to take that ladder apart, as far as that goes, but the hole in the yoke where the bolt comes through, there is three-sixteenths inch play on either side of that bolt, or there was. In other words, the hole of this yoke that is in there now is larger than the hole in the side pieces and it gave a lot of play and due to the looseness laterally, there was a lot of swing and twist in it. Well, it isn't there now. I can't demonstrate it. I am flatly at a loss.

Mr. Splawn: I have a suggestion. In other words, so far as I am concerned, that ladder has not been tampered with at all. There was one wit-

ness present when you first examined it and he has informed me what the measurement was of the arc of play, and as far as I can tell, it's the same as in that ladder now.

Now, I may have a solution for what you think.

Mr. Hudson: Now, I want to make one statement, Homer. While that ladder has been in your custody, I am not trying to impute that you touched or did anything about that.

Mr. Splawn: No, I understand that. It has been out at the Dependable Ladder Company. Now, here is what I suggest we do: I think this is a solution to your problem, I am willing to do this. You have made the statement that [443] there have been inserted two new washers on one side.

Mr. Hudson: And two old ones on the other.

Mr. Splawn: And they were not there before, I think is your idea. Well, I think what I would like to have the jury do is closely inspect the bolt itself, because there is paint in the threads of the bolt, and I think if you unscrewed the nut, and I am going to offer it with the Court's permission, to unscrew those nuts, but before doing that I want the jury to see, you see, what the threads of the bolt look like before they are unscrewed, to see if there is paint in the threads, because otherwise, if we purposely took the nuts off or partially off, it would destroy any evidence that the jury would be entitled to look at in case this matter of tampering would be raised. I would want them to see if there are any signs, with their own eyes, and I will do this with you if we had a wrench of some

kind, the janitor had one, with this witness I will have him or anyone else untighten or unloosen or do whatever you want to, take those nuts off after the jury has examined the bolts before doing that, because otherwise if there is any paint in the threads it would be destroyed, and I am entitled to that, certainly; and I will have this witness or you can on your cross-examination, it makes no difference, ask him the same questions and have him demonstrate, if you will, with the nuts completely off the bolts. [444]

Mr. Hudson: Homer, I want to make a statement to you. As I have just stated, I am connected with manufacturing and am mechanically minded; that thing can be unscrewed and screwed back on, and immediately a simulation of the paint produced there.

Mr. Splawn: That is getting very fine.

Mr. Hudson: I am entitled, Homer, to show everything there is in this case, and if somebody on your side of the case has been tampering with that evidence I am entitled to show that.

The Court: Well, I see no reason why we can't, after all we have to proceed with this case, I don't want to make a career of it, I have got another jury case set for Monday and those people have rights, too. If this case goes over they will not get their case in because I have to go to Spokane on the 8th of April. Now, I think you should proceed here and you can cross-examine on the basis, if you wish, of the assumption of what you are going to contend or testify in good faith; that is,

you may hypothetically, I should think, examine the witness on the basis of the ladder being in the condition in which you claim it was at the time you inspected it, whether there would be more play or what that consequence would be, and I don't think that we should unduly prolong the case here and put it over another week or so because of the development. [445]

Mr. Splawn: What I would be willing to do, as I stated, is to have——

The Court: (Interposing) Well, there is a limit to what we can do in these cases in the way of demonstration and redemonstration, and we get ourselves into a bog the first thing you know here, where this case will have to go over until May to finish it. I don't want anything of that kind here. I think we have got this ladder, I think we should look at it as it is and let everybody testify as to the condition it was in at the time, and let the jury form their conclusion, and of course the jury will have the ladder in the jury room, and of course in argument you can point out the paint on the threads, or anything else, and they will have it in there themselves, as an exhibit in the case.

Mr. Hudson: I assume we should make no attempt to put on any testimony until rebuttal?

The Court: No, I think since, obviously, you have made a showing in good faith of what your testimony is, you should have a right to examine hypothetically on the assumption of what you claim is true. I am not precluding you from making a record in this case.

Mr. Splawn: I wanted to be helpful in this case.

The Court: Well, yes, I appreciate your suggestions. It's unusual and an unusual situation. Sometimes [446] we get cases that run off smoothly and some don't. This is one of those things, unfortunately from my standpoint; fortunately they don't occur too often.

* * * * *

CECIL C. CLARK

recalled as a witness on behalf of the defendants, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Hudson): Is the ladder, Mr. Clark, in its now condition, the same as you have seen it previously?

A. No, I think those bolts were a little looser when I looked it over at the ladder company.

Q. Now, you didn't say anything about that this morning, did you?

A. Well, I was not asked, and I was stopped when I started to make comments, so naturally I wouldn't.

Q. In other words, you didn't inspect it this morning before your testimony?

A. Yes, I did. I inspected it before court convened.

Q. And you were cognizant that they were looser when you saw it previously? [447] A. Yes.

Q. Now, would a three-sixteenths looseness between the side of the yoke and the metallic side of the ladder, would that give more play in the top part of the ladder?

(Testimony of Cecil C. Clark.)

A. Yes, it would give a little more play.

Q. And if the hole in the yoke where this small bolt comes through, if the hole in the yoke is larger than the hole in the side piece, would that give more play?

A. Yes, it's bound to give it a little more play.

Q. Now, the tighter the yoke assembly is attached to the ladder, the less play there is, is that not true.

A. That is right.

Q. You are familiar with new ladders, Mr. Clark?

A. Yes, sir.

Q. Now, in a new ladder, if you know, is the hole in the yoke, the attaching hole in the yoke, the same size as the attaching hole in the side piece on the ladder?

A. Yes.

Q. And is the bolt that connects those pieces together, the yoke with the side piece, are those of a size to fit snugly into those holes?

A. Yes, they fit fairly snug.

Q. And in a new ladder is the bolt drawn up snugly to join them together firmly?

A. Generally, although I have gotten them where they were [448] not.

Q. But, generally speaking, in the manufacture they draw these bolts up snugly?

A. They are not tight, they are up fairly close.

Q. They are not tight to the point of binding, but they are tight to the point of holding it firmly together?

A. There is sometimes a little play in them; you can wiggle them a little when they are new.

(Testimony of Cecil C. Clark.)

Q. Now, Mr. Clark, would a ladder that had a hole in the yoke for the connecting pole to the side piece which was larger, much larger than the hole in the side piece, would that tend to give more opportunity for that ladder to twist at the top?

A. No, not with a person on it.

Q. In other words, the large diameter of the hole and the looseness of the connection would make no difference?

A. Make no difference. You can take those bolts clear out of there and put a couple of sixteen penny nails in there, and you will have quite a lot of slope to it, you can set the ladder up and get it centered properly and climb right up on it and be just as safe, because your weight is all against the bearing, because when you are standing on the ladder there is no coming back, it's all just one way. You can take those bolts out of there and put two nails in and let it be as sloppy [449] as you want to and climb up on it, lay it out on the ground except—you would have to take the nails out, that is all that would be necessary.

Q. Now, Mr. Clark, you figure, you testified, you spent ten thousand hours on a ladder?

A. That is about right; maybe more.

Q. Well, would fifteen thousand be closer?

A. Well, I said ten thousand as a reasonable estimate. I have no record of it, but just going over the years and estimating the hours that I have worked on ladders, I just added up to somewhere in the neighborhood of ten thousand.

(Testimony of Cecil C. Clark.)

Q. That is a lot of hours, isn't it?

A. That is right.

Q. Now, do you feel that you have attained more dexterity on a ladder than a lady has who has picked a few days?

A. That is possible, but I still fall off of them.

Q. Then if after ten thousand hours on a ladder you fall off of them, do you think it's possible that a lady who has had a few days might not handle a ladder with the same dexterity that you do, even though you fall off of them, and she fell herself from the ladder, eh?

A. Anybody who gets careless on a ladder is liable to fall and that is why I do, because I get careless.

Q. Now, there is also a difference in the dexterity of [450] human beings, is there not?

A. Oh, I presume so.

Q. And there is a difference in the physical makeup of human beings, is there not?

A. I presume so.

Q. You are a man of fairly slight build, such as I am.

A. Well, I am not as slight as I used to be.

Q. What do you weigh now?

A. One hundred ninety.

Q. You don't have what I might refer to as too much stomach sticking out here.

A. I do.

Q. Now, a lady who is five feet tall and weighs 150 pounds with the peculiarities that are incident

(Testimony of Cecil C. Clark.)

to the feminine frame, she might have a problem that you don't have, is that correct?

A. Well, I wouldn't know. I would assume they would have different problems, yes.

Q. And all of those factors have got to be taken into consideration, do they not?

A. No, you can't take all those factors into consideration when you make and supply ladders.

Q. I am not inquiring about the making of the ladder, I am inquiring about the use of the ladder.

A. In order to use it, either one. [451]

Q. In other words, you don't consider those?

A. No, I couldn't have a ladder to suit each person's individuality and idiosyncrasies, that would be impossible. We just supply standard, usual ladders, and when the picker accepts them, the ladder, as being all right, and if there is some peculiarity about the ground and so on, we caution them about it, and we assume from there on that they know what they are doing.

Q. Now, Mr. Clark, you have been engaged in farming and agriculture and the orchard business practically all your life, haven't you?

A. That is right.

Q. Now, this ground was disked, as I understand the testimony has been that the Swier orchard was disked. Now, disks leave little furrows, do they not?

A. Well, every disk leaves a different furrow, yes, I would say.

The Court: That wasn't the question, Mr. Clark.

(Testimony of Cecil C. Clark.)

It's whether disks leave furrows; if you will answer the questions I think we might move faster.

A. Well, what is a furrow?

Q. (By Mr. Hudson): If you have been on a farm as long as you have been and you don't know what a disk is, you are not an expert.

A. I have never heard a furrow referred to from a disk. [452] Plows make furrows, disks don't.

The Court: Do you know what he is referring to?

A. They make very slight corrugations.

Q. (By Mr. Hudson): Now, this ladder was standing on a level floor, is that not true?

A. Yes.

Q. Now, there is no such thing as a level piece of orchard, is there?

A. No, sir, not exactly level, very seldom.

Q. And the disking puts in those corrugations or small furrows, whatever you want to call it?

A. Well, not sufficient to bother a ladder, no.

Q. And the ladder is set to the best of a person's ability, is that not correct?

A. That is right.

Q. But it is not set as firmly as it would be on this floor?

A. Oh, it would be much better on disked ground than this floor, because your legs would go into the ground a little bit and they would be imbedded there and be solid; on this floor they could slip a little.

(Testimony of Cecil C. Clark.)

Q. Now, you are assuming that the legs went into the ground and were imbedded and were solid. You don't know that that condition existed, do you?

A. I don't know anything about the condition out there, [453] no, sir. I am trying to answer your questions, what I know about this ladder.

Q. You are stating an ideal condition of a ladder set, and you don't know that all conditions are ideal, do you?

A. Oh, there is seldom conditions that are ideal in an orchard.

The Court: That wasn't the question.

A. I don't know what the conditions were out there, no, sir.

Mr. Hudson: I believe that is all.

The Court: Any redirect inquiry?

Redirect Examination

Q. (By Mr. Splawn): If I may, counsel is referring to dexterity, so far as this ladder is concerned, does it, in its being safe as you have indicated, does that depend upon any dexterity; in other words, when you are climbing up and down the thing do you have to be dexterous in order to make this ladder reasonably safe?

A. No, not if it is properly set up.

Q. I mean, does dexterity have anything to do with it, if it is properly set up in an orchard, is that a factor at all?

A. Dexterity might have some bearing on the

(Testimony of Cecil C. Clark.)

person's [454] setting of the ladder, but not in climbing it.

Q. Well, assuming it's set properly.

A. No, dexterity wouldn't make any difference.

Q. Then, in going up and down, or the safeness of the ladder in using it for apple picking purposes, what factor is dexterity, if any, so far as the ladder being reasonably safe?

A. Well, I don't think there would be any factor. Of course, I am not just too sure what you are including in the term "dexterity."

Q. Well, it was indicated by counsel's inquiry that a person who, let's assume, is not—

The Court: (Interposing) I don't think you should state what he has indicated. The jury has heard the testimony, just ask the questions, please.

Mr. Splawn: Thank you.

Q. Would this ladder vary in its safety as between a wiry person and a solid person, or a heavy person and a light person, or a person who could swivel easily or one who was more or less stiff, would that have anything to do with it?

A. No, except, of course, if you get too much weight, they aren't made for out-sized people exactly, but within reasonable limits on weight, it wouldn't make any difference. [455]

Q. Well, anyway, from 100 to 175 pounds or to 200 pounds?

A. Up to 250 pounds it wouldn't make any difference.

Q. It wouldn't make any difference as to the

(Testimony of Cecil C. Clark.)

character of the person being wiry or dexterous or not dexterous?

A. Unless you are including in this dexterity the thing of reaching too far. Now, I don't know whether that comes under the category.

Q. Well, that might play a part in it.

A. The thing that tips ladders is reaching too far and getting the weight off balance, getting the weight off the three point suspension.

Q. Now, so far as demonstrating this ladder or using it here, would you have any hesitancy to use it even if those nuts were unscrewed, were halfway off?

A. No, you can take the bolts clear out and, as I said a while ago, put a couple of nails in there, leaving it very sloppy, and I would have no hesitancy in setting it up in a tree to pick with it. Of course, that wouldn't be a good way to leave it because the nails might throw out, but if you left it that way you would have no trouble, because this sloppiness in that top would have no bearing on the ladder slipping. If a person could get on the ladder—you would have to demonstrate that.

Q. Would you like to get on it? [456]

The Court: Just a moment. You would have to have the permission of the Court to demonstrate that ladder, and I would like to have counsel approach the bench.

(Whereupon, counsel approached the bench.)

The Court: It seems to me now, in the present state of the record, that without any question of

(Testimony of Cecil C. Clark.)

dispute it's established that this ladder has been tampered with, that it is not in the condition that it was in the warehouse, and whatever he may say as to its not making any difference with it whether it is loose or whether it's tight, I think that is a question for the jury and I think at least until you raise a fact or issue to show that this ladder has not been tampered with, you should not demonstrate it. Of course, the thought immediately occurs to me if it is just as good loose, why was it tightened up before it was brought in here? Your own witness says that it was.

Mr. Splawn: There is also evidence that it has the same arc of play. Now he says that it was looser up there.

The Court: Well, he testifies that it was looser. I don't like the looks of this, frankly. I think there has been tampering with evidence before it was brought in.

Mr. Splawn: Why don't we have it loosened up?

The Court: I am not going to have it loosened. I will not permit you to demonstrate that ladder until you [457] raise an issue of fact that it has been tampered with.

Mr. Splawn: Well, then, I offer to have him put it in the condition in which it was.

The Court: No, I don't think he should be permitted to change that, because they have a right to have the condition as at that time. I will not permit you to change the bolts at all, that is the ruling of the Court.

(Testimony of Cecil C. Clark.)

Mr. Hudson: Yes, sir.

Mr. Splawn: So far as demonstrating with it as it is here, we could hold it and wire it, would you have any objection to that?

The Court: I don't think you should be permitted to demonstrate until you raise an issue of fact that it is in the same condition practically as it was, because you are demonstrating with a ladder which your own witness says has been tampered with.

Mr. Splawn: That is what he wants to demonstrate.

The Court: These people have a right to have it left as it is as evidence of tampering.

Mr. Splawn: Well, but I would also have the right to have him demonstrate. I will take the nuts completely off.

The Court: No, no. There has now been evidence from your own witness before this jury that the bolts and the nuts of this thing have been tightened up. Now, these [458] people have a right to have that thing kept in that condition to show the jury that it has been tampered with.

Mr. Splawn: Well, they can see it and inspect it now.

The Court: No, no.

Mr. Splawn: Then it can be put back as it was.

The Court: No, we would get into endless trouble in trying to agree on whether it had been put back. I have ruled, now go on with the case.

* * * * *

(Testimony of Cecil C. Clark.)

Recross Examination

Q. (By Mr. Splawn): With respect to your testimony concerning the safety of this ladder, would it make a particle of difference if this ladder, and I am speaking of what counsel is referring to as the bolts and nuts up at the top, if the nuts were completely taken off?

The Court: That is repetition. He has testified that if he took the bolts out and put nails in it wouldn't make any difference. Let's not repeat. Go ahead with new evidence, please. [459]

* * * * *

C. A. BRAZIL

called and sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

Q. (By Mr. Splawn): Your name is C. A. Brazil? A. Yes, sir.

Q. And where do you reside? A. Selah.

Q. And what is your occupation or what are your occupations?

A. I am farming and I also operate a warehouse.

Mr. Hudson: Operate a what, sir? [460]

The Court: Warehouse.

Mr. Hudson: Thank you.

Q. (By Mr. Splawn): And what experience have you had in the fruit industry in the Yakima Valley?

A. Well, from the growing standpoint I have

(Testimony of C. A. Brazil.)

been in my own operation twelve years, this is the twelfth year, now.

Q. And what experience or familiarity have you had with ladders and the use thereof for apple-picking purposes in the Valley?

A. Well, through my own experience on my own ranch and through my contact with many growers that we service in the warehouse, I do the field work.

Q. Have you had any occasion to examine the ladder which is in the courtroom? A. Yes.

Q. Does that look like the ladder which you have looked at?

A. That looks like the ladder which I have examined, yes.

Q. And did you examine the various features of the ladder? A. Yes, I did.

Q. When you examined it? A. Yes, I did.

Q. And when you examined it, did you find a play in the tongue of the ladder at the top assembly? A. Yes, some play. [461]

Q. And with respect to that feature and every other feature of the ladder, as you found it to be in your examination—strike that question.

Q. What familiarity have you gained, if any, of ladders that are in common use in the Yakima Valley for apple-picking purposes?

A. Well, I have seen many ladders on various growers' ranches in the entire Valley and I have had occasion to borrow ladders. I have made ar-

(Testimony of C. A. Brazil.)

rangements to borrow ladders from one grower to help another grower that we service, and so on.

Q. With respect to this particular ladder, as you examined it, state whether or not in its condition it was a ladder in common use in the Yakima Valley?

A. Yes, it is.

Q. Now, with respect to the play, or looseness, at the top to which you referred and directing your attention to that feature, what effect, if any, from your experience would that have upon the safe use of the ladder for apple-picking purposes?

A. None whatsoever.

Q. Now, can you explain that?

A. It's necessary, as a matter of fact, to have some play in the top of the tongue, as I refer to it there, so that you have a free, the tongue will swing free and it [462] certainly would be much to the disadvantage of the use of the ladder if it was completely tightened, you couldn't swing your tongue out. I have seen, had occasion, on my own place to have a new ladder that was completely tight and swinging the ladder out it tightened to the place where you would almost shear the bolt off trying to force the tongue out and it is not a suitable ladder.

Q. Now, incidentally, and this is very briefly, have you held any office in a farm organization connected with the fruit industry?

A. I have held and hold office in a general farm organization which covers all commodities.

Q. I see, and what organization is that?

A. That is the Farm Bureau, both the Yakima

(Testimony of C. A. Brazil.)

County and the Washington State Farm Bureau.

Q. And what offices, if any, have you held in those two organizations?

A. I have served as Chairman of the Yakima County Fruit Committee; I have served as Chairman of the Yakima County Marketing Committee; I have served as President of the Yakima County Farm Bureau, and I am at present a State Director of the Washington State Farm Bureau.

Q. Now, with respect to the particular ladder, if a person climbs up the ladder and completely to the top and the [463] ladder is properly set, can there be any effect by reason of the play, or looseness, which I have referred to, to cause the ladder to tip or collapse or to go in any direction?

A. If the ladder is properly set and properly used, I can't see any reason why it should tip.

Q. And does the amount of looseness play any part in that? A. None whatsoever.

Q. If the ladder were properly set, and let us assume on disked ground, and a person climbed up or was on the eighth rung from the bottom and was standing on the eighth rung and not reaching out to pick with a bag about half full of apples and turned and with both feet on that rung slightly to the right to ease off the pressure of the bag against the frame of the ladder, can you think of any conceivable way that that ladder could tip over under those circumstances?

A. I don't see how it could be tipped over if it is properly set.

(Testimony of C. A. Brazil.)

Q. What does it take, from your experience, if the ladder is properly set and with the amount of looseness, or play, or even a greater amount, what would necessarily have to take place for that ladder to tip over?

A. Well, probably, the most probable thing that might happen would be to reach out beyond the reach of the person [464] on the ladder. In other words, to attempt to stretch out to a point where the weight of the body is way off the center of the ladder, if you know what I mean there.

Q. I see. Now, so far as a person's dexterity is concerned, is that any factor so far as the ladder is concerned, if it is properly set, other than reaching out, for example, and being able to reach out to pick apples, is a person's dexterity, is that any factor in the safety of this particular ladder?

A. No, no.

Q. In other words, would the safeness of the ladder vary with the build of the pickers using it?

A. No.

Q. Did I ask you the question as to whether or not that ladder and in the condition that it was when you examined it was or was not a ladder in common use in the Yakima Valley, I don't think I asked that question, did I, your Honor?

The Court: I am not sure, he may answer it, anyway.

A. That ladder is a ladder which is in very common use in the Valley.

Mr. Splawn: That is all.

(Testimony of C. A. Brazil.)

Cross Examination

Q. (By Mr. Hudson): Mr. Brazil, referring to the yoke, the holes on the yoke [465] assembly on the side plates which the little bolt goes through?

A. I am not sure that I quite follow you, sir.

Q. Those little bolts right up there that go through the side plate on the ladder and the yoke assembly?

A. Oh, yes.

Q. Those holes in manufacture are the same size, are they not?

A. I didn't quite understand, sir.

Q. Those holes on those two pieces, they are the same size, are they not, between the yoke and the side plate?

A. The holes in that plate?

Q. Yes.

A. Yes.

Q. Those are the same size?

A. You mean, on either side, sir?

Q. Yes.

A. Yes.

Q. Well, and the holes in the yoke, also, the side of the yoke?

A. Oh, where it matches up? Yes, sir.

Q. Those are the same size?

A. Yes.

Q. And the yoke bolts in the yoke here are a bolt that fits snugly in those holes, am I correct? [466]

A. The bolt that is commonly used is one that slips easily through the hole, yes.

Q. Yes, and the bolt is tightened up, and not to the point of snugness in manufacturing, just so it won't bind, is that correct?

A. That is right.

Q. Now, Mr. Brazil, would the fact that the bolt hole in the yoke was much larger than the hole in

(Testimony of C. A. Brazil.)

the side plate and much larger than the connecting bolt, that would give additional play to the yoke assembly? A. Would you repeat that?

(Last question read.)

A. It would be very little, if any.

Q. In other words, the fact that a small bolt goes through a big hole, that wouldn't make any difference in the play, is that right?

A. It would make some difference in the play, I would imagine, yes.

Q. It would make a lot of difference, wouldn't it, am I right?

A. Well, depending on the size of the bolt, I would say, would determine.

Q. Now, let us assume this: that if the bolt going through there is a three-sixteenths bolt and the hole in the yoke assembly is three-sixteenths larger than the bolt, [467] it would give a lot of play there, wouldn't it? A. Yes, it would.

Q. And if this question is unfair, you say so: now, can you tell me how much the three-sixteenths play up there, how big it would be down at the foot of the tongue?

A. I am afraid I couldn't very well answer that; that is very true, sir.

Q. Now, let's enlarge that this way: let's assume that the yoke instead of being pulled firmly up to the side plate, that there is a three-sixteenths play in the yoke between the yoke and the side plate with a three-sixteenths bolt going into the yoke that

(Testimony of C. A. Brazil.)

has three-sixteenths play, that would, also, give that much more room for play, would it not?

A. Well, I would think it would give, depending on the condition of the bolt and so on, yes, it is hard to determine how much.

Q. Now, if that yoke assembly is loose, as I have described to you, doesn't that give more opportunity for the top of that ladder to twist and become unbalanced? A. No.

Q. That wouldn't affect it? A. No, sir.

Q. The fact that you have got a little bolt going through a big hole doesn't make any difference?

A. That doesn't make any difference.

Q. And the fact that you had a big hole in the yoke assembly and it wasn't tightened up there wouldn't make any difference? A. No.

Q. None at all?

A. No, I wouldn't hesitate to use the ladder.

Mr. Hudson: That is all. The answer, too, I move to strike that, if the Court please, as being not responsive.

The Court: Yes, it wasn't responsive, and I grant the motion to strike it. All right, go ahead.

Redirect Examination

Q. (By Mr. Splawn): With respect to the ladders in ordinary use in the Valley, and you stated that you had familiarity with ladders in ordinary use in the Valley, the looseness, such as you found to exist, was that unusual? A. No.

Q. And when you say that that looseness, such

(Testimony of C. A. Brazil.)

as counsel referred to, would have no effect, how do you explain that?

A. If the ladder is properly set and the tongue is straight forward on the ladder when it is being used, whatever that play in that, I refer to it as the "hinge," that is [469] a way of referring to that yoke, as the gentleman calls it, has no effect upon the twisting or the moving of the ladder.

Q. For example, a brand new ladder that has never been used and is absolutely rigid at the top, that is, so far as its connection with the yoke, as Mr. Hudson calls it, can you set that out on a floor such as this, or any surface, and press in on one leg and cramp it, or put it into a torque?

A. Oh, yes, yes.

Q. Can you do that just as easily with a new ladder as you can with a used one?

A. Yes, a wood ladder will twist, if you set it in an improper position you can stand there and just push on it.

Q. I am speaking with no weight on it.

A. You can push it.

Q. Any wood ladder? A. Yes.

Q. New or used? A. That is true.

Q. And one just as well as the other, is that right? A. Yes.

Mr. Splawn: That is all. [470]

Recross Examination

Q. (By Mr. Hudson): Now, Mr. Brazil, you have qualified here as an expert, if, and I will adopt

(Testimony of C. A. Brazil.)

your word "hinge," if an extremely loose hinge is beneficial to the operation of the ladder why don't the manufacturers make them that way?

A. I don't believe, sir, that I said it was beneficial to the ladder, I said it didn't detract from the safety of the ladder.

Q. Now, you testified that ladders in this general condition are in common use in the Valley?

A. Yes, sir.

Q. Now, how do you know they are?

A. I have seen quite a few hundred, sir, maybe in the thousands, I wouldn't know.

Q. You didn't see them, Mr. Brazil, you observed them off to the distance, didn't you?

A. No, sir, I have carried ladders, I have repaired ladders, I have used ladders.

Q. Have you inspected that hinge, did you inspect it previously?

A. If that is the ladder that I looked at, yes.

Q. And are all ladders that you say are in common use here in the Valley, are their hinges in that condition?

A. I would say that most of them are, a new ladder just [471] coming out would not be that loose.

Q. You are sure about that now, Mr. Brazil?

A. Yes, sir. [472]

* * * * *

BEN HOVDE

called and sworn as a witness on behalf of the defendants, testified as follows: [473]

Direct Examination

Q. (By Mr. Splawn): Your name is Ben Hovde? A. That is right.

Q. And where do you reside?

A. Route 2, Selah.

Q. And what is your occupation?

A. I am a fruit rancher.

Q. And how long have you been a fruit rancher?

A. Since 1941.

Q. What experience have you had with ladders and how ladders operate?

A. Well, I have used them, I used to pick apples when I first came in the Valley, that was in '29 and the '30's, and used to go out on Sundays and pick for different farmers. I have my own ladders, which is about twenty. I have, also, borrowed ladders from neighbors, so I have had quite a bit of experience in handling ladders.

Q. Have you gained, during the course of your career as a fruit rancher, a familiarity with ladders that are in common use in the Yakima Valley for apple-picking purposes? A. I have.

Q. Does that encompass the period of 1955?

A. Yes. [474]

Q. Briefly, what offices or directorships have you held in agricultural organizations?

A. Well, I was President of the Yakima County Farm Bureau for two years. I have served on the

(Testimony of Ben Hovde.)

State Board of Directors for the State Farm Bureau. I am at present the State Organization Director. I have helped in setting up the bargaining association for pears here in the Yakima Valley; served as Chairman of a group in Selah to get the Selah area organized.

Q. Have you observed a ladder in the courtroom? A. Well, I see it, now.

Mr. Hudson: Now, that wasn't quite the question, he asked if he had observed it before.

Q. (By Mr. Splawn): No, I should say: do you observe a ladder in the courtroom? A. Yes.

Q. And that ladder, for your information, is marked Defendants' Exhibit 1, I believe, and it has been further identified as a ladder belonging to one Walter Swier. Now, have you examined that ladder at any time previously?

A. I examined that ladder at Dependable Ladder Company in their warehouse.

Q. I see, and what kind of examination or testing, if any, did you make of that ladder? [475]

A. Well, I just reclined it to see if there was any sway in the ladder. I found it to be in good condition.

Q. Did you observe a play, or looseness, in the top assembly where the tongue fits on to the platform at the top?

Mr. Hudson: If the Court please, I question very seriously whether a man who uses twenty ladders could qualify as an expert, but I see no point

(Testimony of Ben Hovde.)

in raising the objection because if it was sustained it would just take that much more time.

The Court: All right, the record will show an objection. I will have the record show an objection on all of them, you need not repeat it, if the circumstances are similar with these witnesses.

Mr. Hudson: Yes.

Q. (By Mr. Splawn): In your examination or testing of the particular ladder as you have indicated, did you find a looseness or play at the top where the tongue assembly fits into the top part of the ladder?

A. Just the regular play that a ladder would have in average use.

Q. I see, and did you examine the ladder otherwise? A. Pretty much, yes.

Q. And I will ask you this question: as you found the ladder, what would you say as to its being, including all conditions, in common use in the Yakima Valley? [476]

A. I would say it's average or above average.

Q. Now, with respect to looseness at the top, if the ladder is set properly, what effect, if any, can the looseness or any amount of looseness have upon the stability or safety of the ladder?

A. Well, I can't see that it would have any. It's absolutely a normal ladder, what most all the farmers use. It's good and solid.

Q. If one were standing on the eighth rung and the ladder were set properly and the person standing on the eighth rung was not lifting a foot down

(Testimony of Ben Hovde.)

or up, but standing on the eighth rung with a picking bag half full of apples and turned slightly the body to the right to ease off the pressure of the bag against the frame of the ladder with both feet still on the eighth rung, is there any way that that looseness at the top or play or any amount of looseness at the top would have any effect so as to cause the ladder to tip over or sway or collapse?

A. I can't see any.

Q. If the ladder were set properly, what would it take, in your experience to cause it to tip over?

A. Well, I would say that if it was set properly, unless you leaned over too far, why, it shouldn't tip over.

Mr. Splawn: That is all. [477]

Cross Examination

Q. (By Mr. Hudson): Do you pronounce that "Huv-dee"? A. "Huv-dee."

Q. Would the fact that there were longitudinal splits coming down the side leg, the right side leg from the top platform, mean anything to you?

A. No, it wouldn't.

Q. It is just as good as though the splits weren't there?

A. That is right, it's practically as good.

Q. It doesn't affect the strength of the wood in any way?

A. Well, I can't see where it would affect it to the point where the ladder would fall over.

Q. I didn't ask you whether it would fall over,

(Testimony of Ben Hovde.)

I asked you whether it would affect the strength?

A. It wouldn't affect the strength.

Q. You would buy a ladder with split legs, would you?

A. Oh, no, not unless it was new, no, but the drying of the wood would have some effect in cracking.

Q. You don't think the splitting of the legs there would affect it so it would twist?

A. No, I don't. As a matter of fact, I would be willing to climb the ladder any time.

Q. So will I, right on that floor.

A. So will I, any place you want to put it. [478]

Q. Are you sure it wouldn't bother you? Now, of course, you have qualified yourself as an expert here, and you say that that ladder is in the condition of all ladders of a similar nature in common use throughout the Valley, is that correct?

A. Yes, I would say that.

Q. Now, you don't know whether that is true or not, do you?

A. Pretty much, I have observed.

Q. Are you sure? A. Sure.

Q. Now, I want to get the nomenclature of this understood between you and me, that top part, do you refer to that as a hinge or a yoke?

A. Well, I would refer to it as a hinge, that is the way I would qualify it.

Q. All right, now, those ladders when they are manufactured, the hole going through the side of

(Testimony of Ben Hovde.)

the hinge and through the side plate on the ladder are the same size, are they not?

A. I suppose, presumably, so, practically.

Q. And they have a hole going through there that the bolt will go through snug?

A. That is right.

Q. Now, when that ladder is assembled that bolt is screwed up so that they are held together snugly without binding, [479] right? A. Right.

Q. Now, if the hole in the tongue part of the hinge was three-sixteenths of an inch larger than the hole in the side plate on the leg, would you say that all the ladders in the Valley are the same way?

A. I wouldn't say they all would be, but I think it would fall within the average, because there is bound to be a little wear as time goes on.

Q. Well, how do you think they got that way?

A. What is that?

Q. How do you think they got that way?

A. By usage.

Q. Do you think that they will wear a hole that big? A. By usage, surely.

Q. But you don't think that the hole was made that big?

A. Well, when the hole is made, why, it's built for a certain bolt; there is a little play even then.

Q. You don't know that that is the same hinge that was on there, do you, the same tongue part?

A. Well, I would have to examine it a little closer, I can tell you pretty close.

(Testimony of Ben Hovde.)

Q. I thought you said you did examine it?

A. I have examined it there, but I haven't examined it here.

Q. Do you think it has been changed? [480]

A. I wouldn't see any reason for it.

Q. But you have testified that they are all the same way, now; if you will assume this set of facts, Mr. Hovde: that the hole in the tongue part of the hinge is three-sixteenths of an inch larger than the bolt going through and that there is three-sixteenths of an inch play between the tongue side of the hinge and the side plate, would you say that those combined factors would make that top looser?

A. With weight on there, I don't think it would make much difference.

Q. Now, if it had been testified that in respect to ladders that had been tight and you found three-sixteenths of an inch play on either side of the tongue side of the hinge, would you think that they had been tightened?

A. Will you repeat that question again, please?

Q. If there was testimony that before those ladders were put out that everything had been tightened, would you think that if there was three-sixteenths of an inch play lateral-wise between the tongue side of the hinge and the ladder like side of the hinge that they had been tightened?

A. You mean, now?

Q. No, before they were used in 1955?

A. Well, I would think that they had been, perhaps, checked [481] on and found to be safe

(Testimony of Ben Hovde.)

equipment. It isn't necessary to tighten those bolts up there, I wouldn't think, as long as their nuts are on in good shape.

Q. In other words, if you wanted to tighten them up, why, you would bring it up to three-sixteenths of an inch and stop?

A. Most of those we just leave those pretty much as they are because if you twist on them you could break them.

Q. And you don't think that the looseness that I have described in this hypothetical case would have any effect on the ladder twisting?

A. No, I do not.

Q. You don't think it would have?

A. I absolutely do not.

Q. You don't think it would have any effect to take a twist at all?

A. I absolutely do not.

Q. And you don't think that looseness there would have an effect of twisting, I am going to say, a twist to the right or a twist to the right and raise that left leg and tip it?

A. No, that would not have anything to do with it. The more rigid the ladder is the easier it is to tip. I can take you out and show you an aluminum ladder that will tip much easier than a wood with little play. [482]

Q. We are not discussing aluminum ladders, were we? A. No.

Q. We are discussing this one?

A. That is right.

(Testimony of Ben Hovde.)

Q. And if this looseness that I have described, if that was beneficial to the operation and safety of the ladder, don't you suppose the manufacturer would make them that way?

A. Well, he makes them within reason, he uses the bolts, they tighten them up to where they feel they should be, but they are bound to get a little play when they are in use. Any piece of equipment will loosen up.

Q. You have got to have a little play?

A. Yes.

Q. But that is all the play you want in it, isn't it?

A. Well, that might be all the manufacturer would care to have, but farmers, why, they have a little more when they have them in use a year or two.

Q. Why, yes, they have a little more, but then all they do is have the tongue swing back and forth?

A. They have the tongue swing back and forth.

Q. They don't go in and enlarge the hole there so it will go up and down this way (indicating)?

A. No, they don't enlarge the hole up and down. What?

Q. They don't go in and enlarge the hole there so it will [483] go up and down this way (indicating)?

A. No, that comes by wear.

Q. And they don't loosen the bolt so it has got lateral play, do they?

A. No.

Mr. Hudson: That is all.

(Testimony of Ben Hovde.)

Redirect Examination

Q. (By Mr. Splawn): Mr. Hovde, looking at the top of that ladder and if the nuts were taken off entirely and aside from the fact that the bolts might eventually fall out because there would be no nuts on them, if you took off the nuts entirely on those two bolts up at the top, do you know what bolts I am talking about? A. Yes.

Q. Would that make any difference as far as the stability of the ladder was concerned if it were properly set?

A. As long as the bolts are in there, I would think that the ladder would still stand up under proper setting. [484]

* * * * *

WALTER SWIER

the defendant, recalled as a witness in his own behalf, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. Splawn): In the year 1955, when did Mr. and Mrs. Wong come to your place to live?

A. Oh, I don't know definitely, I would say June or July.

Q. And prior to that time had you had on your place any other members of the Wong family?

A. Yes, about two years previous the elder boy stayed with us for the summer.

Q. And did anyone else in the family stay with

(Testimony of Walter Swier.)

you prior to the parents coming there to live in June or July of 1955?

A. Well, in the fall of '54 the boy and the two elder girls came to our place to live with us, presumably for a couple of years.

Q. And when Mr. and Mrs. Wong arrived in the summer of 1955 or at the time that you have indicated, where did they stay on your place?

A. In a small adjoining tenant house on the premises. [485]

Q. And they continued to reside there for up to what time?

A. Oh, until about June, I think, of '56; I don't remember definitely, it's on the record, I am not good at dates.

Q. When they came what employment, if any, did you furnish either Mr. or Mrs. Wong?

A. Well, they both picked pears, oh, approximately the first of September, for approximately a week, and he also had picked cherries during cherry season, and the boy and he put in a few days, perhaps, at thinning, and some propping.

Q. Did Mrs. Wong pick pears for you?

A. Yes, sir.

Q. That fall? And during the course of pear picking did she use a ladder, do you know?

A. Certainly.

Q. I see, and did she operate on her rows or did she work for her husband, or what do you recall in that respect?

(Testimony of Walter Swier.)

A. Well, oh, as I recall they picked together a row.

Q. And so far as her handling the ladder which she had during that picking, what did you observe about that, if you observed anything?

A. Well, the man usually takes the taller ladder and the woman the shorter one, and she handled her own ladder, as far as I could ascertain.

Q. I see. Now, when next did she do any work for you after [486] pear picking?

A. Oh, there was an intermission of approximately a month before apple season.

Q. During the pear picking did she or anyone else indicate to you anything concerning her lack of knowledge concerning picking or the handling of a ladder?

A. Oh, I don't know just how to answer that. We brought the ladders out and the bags and instructed them how to pick, which is normal procedure, and they are people of normal intelligence and they picked pears.

Q. Well, was any complaint or thing brought to your attention by either Mr. or Mrs. Wong about her lack of knowledge as to how to go about picking, or to handle a ladder? A. No, sir.

Q. When apple picking commenced, and I am speaking of the fall of 1955, what was done, as you know, about furnishing the Wongs ladders with which to pick?

A. Well, they were furnished four ladders, for

(Testimony of Walter Swier.)

Mr. and Mrs. Wong and two of the children that picked after school, and during vacation.

Q. I see, and was there any change of those ladders? A. None.

Q. Now, it was testified that apple picking began either the latter part of the first week in October or the [487] first part of the following week, is that approximately correct, as you recall?

A. Yes, sir. We had been picking about eight or ten days at the time of the incident.

Q. And the incident to which you refer occurred on what date? A. October 17.

Q. Now, during this interval of time from the commencement of apple picking to the date of the accident, did Mrs. Wong work every day?

A. To the best of my knowledge, yes.

Q. I see. And what about the use of her ladder, as far as that was concerned, did she, like in pear picking, handle her own ladder and make her own sets? A. Yes, sir.

Q. At any time during the course of apple picking did she or anyone else ever express to you in any manner anything about having any trouble with her ladder or having any trouble in using it to pick apples, for any reason? A. No, sir.

Q. Referring to Defendants' Exhibit 1, which is the ladder in question, was that the ladder, so far as you know, that she used? A. Yes, sir.

Q. When did you, or where were you when you first learned [488] that Mrs. Wong had had an accident?

(Testimony of Walter Swier.)

A. Oh, the place has a sort of a pasture running east and west, the orchard we had been picking was to the south, and the present orchard, as of that morning, was to the north of this pasture, and I was loading on the south side of the place when I heard some screaming and calling for help and my name called.

Q. Were you the first to arrive at the scene of the accident? A. No, sir.

Q. Who had arrived there before you, if you know?

A. Well, she was picking with her husband and son and daughter, taking two rows parallel, and my son was picking at an adjacent row, and also one other picker by the name of Sam Dart; these six were picking that day.

Q. Does he live around here somewhere?

A. No, sir.

Q. What variety of apples were being picked or what variety was being picked at that time or that Mrs. Wong was picking?

A. Delicious.

Q. And were these old trees or young trees, or about what age of trees were they?

A. Well, I call it my young orchard because the trees are smaller and they discarded all their twelve foot ladders [489] and a ten foot ladder would amply pick them.

Q. And was that true of the tree at which Mrs. Wong sustained her accident? A. Yes, sir.

(Testimony of Walter Swier.)

Q. Incidentally, as the pickers picked their apples, how do they stack them in the orchard?

A. Oh, it depends on the picker.

Q. I see. Were there any apples stacked in the orchard three high?

A. Yes, sir, that was common practice. It takes less space on the ground and, well, I am a little selfish in that, perhaps, I don't need to level boxes, I would rather heap them, and also it conserves space for there is more room for the pickers to work.

Q. During the period of time that Mr. and Mrs. Wong were at your place from June or July of that summer, where did the three elder children which you had previously had stay?

A. What is that?

(Last question read.)

A. Well, that is a sort of a mixed question. The house was rather small that they moved into and the children had spent the winter and the early part of the summer with us and, well, we have a large, rambling house there, an old-style country house, so they kept their rooms [490] upstairs but they would go during the day with their parents, and ate with them, they slept in our house is what I am trying to say.

Q. Just generally speaking, through what connection did you folks become acquainted with the Wongs?

A. Oh, through religious organizations.

* * * * *

(Testimony of Walter Swier.)

Q. If you know, I don't know whether you know or not, Walter, but I am going to ask you the question: do you know what earnings or what they earned, other than what [491] you paid them at your place, were they doing anything other than that from which they derived any income of which you know?

The Court: Now, pardon me, I think that the witness should answer that from his own personal knowledge of what they received or from statements which they made to him, one or the other, and not from hearsay.

Q. (By Mr. Splawn): Yes, from what they have mentioned to you or what you knew otherwise of your own personal knowledge, I meant to say that.

The Court: Yes.

Mr. Splawn: Thank you.

A. I cannot state in terms of dollars, all I know is in work.

Q. (By Mr. Splawn): Did they make any statements to you concerning their earnings or being able to get along financially?

A. Well, I do know that it is the press of circumstances that caused them to come to our place.

Q. Were those financial circumstances?

A. Yes, sir.

Q. Did they pay you anything for rent for their quarters on your place?

A. No, sir, that was never asked or suggested.

Q. I see. So far as the care of the three elder

(Testimony of Walter Swier.)

children [492] before they came, did you receive any compensation for that; if so, how much?

A. Well, I did not and I didn't ask for it. I didn't expect it, my wife was given some once.

Q. I see. A. Personally, I did not.

Q. Now, the place or the tree where the accident happened, what was the area there like, so far as being level is concerned?

A. Oh, it was about as nearly level as an irrigated farm could be.

Q. And this was an irrigated farm?

A. Yes, sir.

Q. And it has been testified that the ground was disked at the place where the ladder was set when the fall occurred, is that correct?

A. That is correct.

Q. Now, your ditches ran in what direction?

A. Well, the ditches ran north and south.

Q. I see, and the picking was done in what direction, that is, following the trees?

A. Well, the orchard has fillers and the place is set out rather peculiarly in the form of a parallelogram, so I run my spraying and hauling at a, well, shall I say a bias; in other words, these rows were southeast and [493] northwest.

Q. Then a picking row did not coincide with a ditch row? A. No, sir.

Q. You were there, I take it, when Mrs. Wong was taken to the hospital?

A. I arrived there shortly after. I heard the call for help and so I made arrangements to get

(Testimony of Walter Swier.)

her out of the orchard and I myself put on, tied on the splint on the limb.

Q. Was your son, David, there to assist you with that? A. He was there before I was.

Q. I see, and you were there when she left by ambulance, I assume? A. Yes, sir.

Q. For the hospital. Now, you didn't see her fall? A. No, sir.

Q. Do you know of anyone who actually saw her fall?

A. No, I don't actually know of anybody that saw the fall.

Q. I see, so you can't offer anything about that because you don't know? A. No, sir.

Q. Was the ladder broken in any way?

A. Well, this is the ladder.

Q. Yes. Now, after the date of the accident did you ever inquire from Mrs. Wong as to what had happened? [494]

A. I did after she returned from the hospital.

Q. And that would have been——

A. Sometime after the 13th of December.

Q. I see. And where did she go when she returned?

A. To the same tenant house where they had been living. The husband and the children all resided there while she was in the hospital.

Q. Do you remember what you asked her or what you did so far as trying to learn what had happened?

A. Oh, you will recall that was the winter of

(Testimony of Walter Swier.)

a very deep snow, and she was unable to move around, so we used to, oh, visit perhaps almost daily and chat, and when she was somewhat recovered I asked her one day, I said, "Rose, what in the world brought on your fall?"

Mr. Hudson: Now, if the Court please, before we go into that conversation I would like to have the time and place and who was there.

The Court: Yes, counsel is entitled to have that.

Q. (By Mr. Splawn): Is that the tenant house, or at your house? A. In the tenant house.

Q. I see. And it was after she returned from the hospital?

The Court: Pardon me, Mr. Splawn, I think the witness should fix the time as near as he can, and who was present. [495]

Mr. Splawn: Pardon me, I see.

Q. Do you know the date?

A. Not definitely.

Q. What would be the best way that you can express the date or the period of time by the month or the week?

A. Oh, I would say in the latter part of the month of December.

Q. And do you have any recollection concerning the time of day?

A. It was in the morning, perhaps ten or eleven o'clock.

Q. Do you remember who was present when you inquired of her and she gave any explanation?

A. That particular day?

(Testimony of Walter Swier.)

Q. Yes.

A. Oh, my wife was there, and her husband, and the two small pre-school children.

Q. And you asked her what you just stated?

A. That is right.

Q. Walter, what did Mrs. Wong tell you?

A. Well, she said she didn't know definitely, but as near as she could remember, she had reached out for some apples as she was about to finish the tree, and she was up about five or six steps and was coming down.

Q. Did she indicate about what step she was when she fell or something happened to get her off the ladder? [496]

A. Well, she said she wasn't definitely sure but she thought it was about the fourth step.

Q. I see. Did she indicate, then, what she struck her leg on; do you remember her indicating anything of that nature?

A. Well, that was common knowledge, she knew.

Q. Well, what was it?

A. The corner of a box of apples.

Mr. Hudson: Now, if the Court please, I am not particularly concerned about what was common knowledge and his statement, if she knew. If she stated, well, let's just have her testimony.

The Court: Yes, I think that should be stricken and the jury instructed to disregard it, that it was common knowledge and that she knew. You may state what she said

Mr. Splawn: Yes, thank you.

(Testimony of Walter Swier.)

Q. What did she say in that respect, as you remember, if she did indicate or say anything about what her leg struck?

A. Well, she fell and she said she struck her leg on the edge of a box.

Q. It was testified yesterday, I believe, when you were up here yesterday—

A. Yes.

Q. (Continuing) —by Mrs. Wong that one time in that [497] winter you went out with Mr. Wong to where the ladder was?

A. Yes, sir.

Q. Did you?

A. I did.

Q. And tell us about that occasion.

A. Well, I wanted to look at the ladder and I wanted him to see it; it was in the shed on the place.

Q. And did you go out there with him?

A. I did.

Q. And did you show him the ladder?

A. I did.

Q. And did he inspect it?

A. Well, I showed him the movement in the tongue.

Mr. Hudson: If the Court please, I don't want to be objecting all the time, if counsel would let the witness testify instead of asking questions that require only a yes or no answer.

Mr. Splawn: I'm sorry, I will try to accommodate counsel.

The Court: I think you have been leading.

Q. (By Mr. Splawn): Well, what took place out there?

A. Sir?

(Testimony of Walter Swier.)

The Court: It isn't accommodating counsel, that is what you are supposed to do. [498]

Mr. Splawn: Yes, all right, thank you.

The Court: All right.

A. I moved the tongue of the ladder.

Q. (By Mr. Splawn): Did it have a play?

A. Yes, sir.

Q. And like it has now?

Mr. Hudson: Now, just a moment.

The Court: You are leading again. Why don't you let the witness testify.

Mr. Splawn: I am sorry, I will withdraw the question.

Q. And is that play, how would you describe it so far as the ladder is concerned?

A. Oh, I would say it had a play of about three inches one way and four the other, from center.

The Court: Pardon me, just to make it clear, do you mean that the bottom of the tongue or third leg there had three or four inches play?

A. No, I mean, your Honor, if you lay the ladder back so that the tongue was on the ladder on top and put it in.

Q. (By Mr. Splawn): You would move it about three inches one way and four the other?

The Court: Would that be at the bottom of the tongue? A. Yes, sir. [499]

The Court: Well, that is what I wanted. All right, go ahead.

Q. (By Mr. Splawn): And then where did you go?

(Testimony of Walter Swier.)

A. Oh, as I recall, we went back to the cabin where Mrs. Wong was.

Q. And did you hear Mrs. Wong's testimony about what you did at that time?

A. Yes. She had sort of a drawing, a diagram, as I recall, on the back of a, oh, one of these bargain sheets for groceries.

Q. Yes, did you do anything like that?

A. I do not recall it if I did.

Q. Do you remember Mrs. Wong saying, Walter, that at that time you told her that the ladder was defective? A. No, I do not, I admitted play.

Q. What?

A. I admitted play in the tongue of the ladder.

Q. Did you ever characterize that to anyone as being a defect or something wrong about the ladder?

Mr. Hudson: Now, if the Court please, here we have got the question and there is only one possible answer, "Did you ever admit to anyone that that play was a defect in the ladder?" Your Honor, it's testimony from counsel and it is prejudicial to this jury.

Mr. Splawn: If your Honor please, there was [500] testimony by the plaintiff as to that and, of course, in rebuttal of that I would have the right to direct the witness' attention to that testimony and ask him, because that was already testified in their case in chief, so it would not be leading such as counsel suggests.

(Testimony of Walter Swier.)

Mr. Hudson: Let's have the reporter read the question.

(Last question read.)

The Court: Well, I think you should ask him whether or not she did say.

Mr. Splawn: Of course, he said "defect" and I was just asking about it.

The Court: I will permit it to stand. I wish you would refrain from leading as much as you can.

Mr. Splawn: Thank you.

A. I admitted looseness.

Q. (By Mr. Splawn): Well, will you answer my question: did you say that that was a defect or something wrong?

The Court: Now, I think that is leading. Did you ever say anything about it being a defect, was that ever discussed by you?

A. I do not recollect it being used, that word.

The Court: All right, go ahead.

Mr. Hudson: If the Court please, I believe his answer of that question was that he described it as a looseness, [501] not a defect.

Mr. Splawn: Yes, that is correct.

The Court: Yes.

Q. (By Mr. Splawn): Did Mrs. Wong or Mr. Wong during that winter and after the date of the accident ever have any conversation with you claiming anything to have been wrong about the ladder, or anything of that kind?

A. No, they made no claims, to my knowledge.

(Testimony of Walter Swier.)

Q. What is that?

A. They made no claims of such, to my knowledge.

Mr. Splawn: I see.

Mr. Hudson: What is the date of this?

Mr. Splawn: I will say after the date of the accident, following the date of the accident.

Q. When, as you recall, was the first occasion that the Wongs asserted a claim against you for something wrong?

A. Oh, I wouldn't remember as to dates, but I had knowledge of it sometime before the papers were served.

Q. How long before?

Mr. Hudson: Now, if the Court please, I think that is wholly irrelevant as to when they knew somebody was going to make a claim against them.

Mr. Splawn: Oh, it has some materiality and relevancy.

Mr. Hudson: What is it material to in this case? There is no materiality. It's incompetent, it's irrelevant.

Mr. Splawn: It's some evidence as to whether or not they actually bonafidely felt they had a claim, the length of time was so normal, if they felt they had a claim to permit them to bring an action.

The Court: I will permit him to answer.

Q. (By Mr. Splawn): How long before the suit was actually served on you, Walter, was there any indication, or what were the circumstances, or what was said?

(Testimony of Walter Swier.)

A. Oh, I recall of one occasion when I was asked if we would have any, I don't know the exact words, but if we had any ill-feeling about a friendly claim.

Q. That wasn't in the form of a question?

A. That is right, pressed against us.

Mr. Hudson: When was this?

A. Oh, some weeks before the claim was filed. I wouldn't know exactly when, I didn't keep dates.

Q. (By Mr. Splawn): And when was the suit filed against you, Walter?

A. Frankly, I don't remember.

Q. I see. Well, the record would show that. What was that in connection with, if you know?

Mr. Hudson: What was what in connection with?

Mr. Splawn: Well, their coming, this statement that he has testified to. [503]

Q. Was anyone else there, or how did it come out, or anything that surrounded that transaction?

A. Yes, Miss Loveland was there.

Q. And who is she? That is Mrs. Wong's sister?

A. That is right.

Q. I think that has been mentioned. Now, so far as your experience is concerned in orcharding, Walter, what has been your experience?

A. Oh, practically a lifetime at it, since about 1918.

Q. And in what areas?

A. Well, in the Moxee area, and around Wapato, and then in the last three or four years at the present location.

(Testimony of Walter Swier.)

Q. Are all those locations in the Yakima Valley?

A. Yes, sir.

Q. And at your Cowiche place, is that the only place you have? A. Yes, sir.

Q. And what experience, Walter, have you had with ladders and the use of ladders and how ladders work?

A. Oh, during the years I perhaps have owned hundreds of them. I have done a lot of picking myself, I have exchanged work, and I have borrowed ladders and loaned them.

Q. So far as your community up there around Cowiche is concerned, in your experience have you gained any [504] familiarity with ladders that are in common use among the orchardists?

A. Certainly.

Q. Well, so far as this particular ladder is concerned, on the date of the accident, and with all the features that the ladder had including the looseness and play that you testified you showed Mr. Wong, what would you say as to the ladder being one that was in common and ordinary use in the community?

Mr. Hudson: Just a minute, I object to that question, not that he might not be qualified to state, but from the standpoint of the defendant here the answer to that question can only be a self-serving statement, and I object to him answering it.

The Court: Overruled, he may answer.

A. Well, as to variety or brand of ladders, it's the only ladder which the Co-operative of which I

(Testimony of Walter Swier.)

am a part handles. It's the only brand they have handled for years, and as to its condition, I would say it's average or better than average.

Q. (By Mr. Splawn): And do you include in that this looseness and play to which you referred?

A. Yes, I wouldn't be afraid to go out and work with it today.

Q. Would your statement be any different on the date of [505] the accident? A. No, sir.

* * * * * [506]

HERBERT ROSSOW

called and sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

Q. (By Mr. Splawn): Your name is Herb Rossow? A. Right.

Q. And where do you live?

A. 1119 Queen.

Q. And what is your business?

A. I own and operate the Dependable Ladder Shop.

Q. And that has been from what date?

A. Since the first of January of this year.

Q. Prior to that time, what was your occupation?

A. I was shop foreman in the shop down there for five years.

Q. At Dependable Ladder Company? [507]

A. Right.

(Testimony of Herbert Rossow.)

Q. And where is that located?

A. At 2402 Fruitvale Boulevard.

Q. And in what city is that? A. Yakima.

Q. What is the nature of your business?

A. Manufacturing orchard ladders and stepladders and all kinds of ladders.

Q. And in addition to that, what do you do at your plant?

A. We have the agency for the Crawford door.

Q. I mean, so far as ladders are concerned?

A. We repair ladders, make all of the parts for our ladders, and repair the different growers' ladders that is brought in for repair.

Q. During the course of your being connected with the Dependable Ladder Company, both as superintendent or shop foreman, did you say?

A. Yes.

Q. And as owner, how many ladders have you had there from the Yakima Valley, approximately, if you can state, for repair?

A. Well, that would be a very hard thing to say.

Q. Would it run into many figures, or just a few? A. It would be many figures.

Q. Would it be over a thousand? [508]

A. Yes.

Q. Now, in your repair work what do you do so far as the growers' directions are concerned. Do you do general repair or do you repair as ordered?

A. We repair both ways.

Q. During that course of business, both the shop

(Testimony of Herbert Rossow.)

foreman and as the owner now, have you had an opportunity to observe ladders brought into your place of business from all points of the Yakima Valley? A. Yes.

Q. And have you observed those portions of those ladders which were not brought in to be repaired? A. Yes, I have.

Q. In addition to that opportunity for observation, what other contact, if any, have you had with the orchard business in the Yakima Valley to become acquainted with ladders in common use throughout the Valley?

A. Well, we go out and pick up ladders out at the different ranches and, consequently, we get to see all different types of ladders that are being used on the different ranches.

Q. Can you say that you have gained a familiarity with ladders in common use throughout the Yakima Valley?

A. I can very truthfully say "yes."

Q. Have you had any other occupation in the last five or [509] six years, other than in the ladder business, such as you have testified?

A. No, that is the only occupation I have had.

Q. I see, have you become familiar with a particular ladder, one that belongs to Mr. Walter Swier of Cowiche, which was brought to your place to be kept? A. Yes.

Q. And directing your attention to a ladder in the courtroom, do you recognize that as the ladder in question? A. I do.

(Testimony of Herbert Rossow.)

Q. Perhaps you don't recall the exact time, but as best you can recollect, how long has that ladder been in your place of business?

A. It's right around a year, maybe a little more, I can't just exactly say when it was brought in.

Q. Have you yourself made any inspection or inspections of the ladder?

A. I have seen it, inspected it, certainly.

Q. And have you yourself climbed on the ladder and done any testing of it?

A. Yes, I have climbed on the ladder.

Q. And have you tested the ladder in any way?

A. Other than climbing on it and testing it for looseness, that is the only thing.

Q. I see, and have you at one or more times while it has [510] been there, examined the top part of this ladder? A. Yes.

Q. And what did your examination reveal concerning that portion of the ladder?

A. There is a little looseness up in there, but it doesn't make any difference on that.

(Whereupon, counsel Splawn brought the ladder forward in the courtroom.)

Q. Incidentally, do you remember when that ladder, or the occasion of it coming into your plant for storage?

A. No, I don't remember just when it came in because I, up until the first of the year, I was in and out of the shop considerable.

Q. I see. Do you remember becoming aware of the ladder in your shop? A. Yes.

(Testimony of Herbert Rossow.)

Q. And did you make observations of the ladder concerning its condition?

A. Yes, I checked it over when it was brought in, as soon as I knew it was brought in there.

Q. Incidentally, do you recall any occasion when a Mr. Hudson and a Miss Loveland and Mr. Mullins, attorneys, were out at your plant and made an inspection of this ladder; do you remember that occasion?

A. Yes, that was just about a year ago, or prior to a year. [511]

Q. Were you there? A. Yes.

Q. Did you attend that inspection?

A. I did.

Q. And will you step down, Mr. Rossow, and test this ladder for its play or looseness?

A. (Witness examines ladder) At that time it was inspected by me, I am quite sure I am right, it was in the center, the tongue was set in the center, and there was approximately four inches play in this center over on the one side, not so much on the other side; you can push over there about four inches play in the bottom of it.

Q. Well, what about the comparison of that play, such as you have demonstrated there as it is now, with what that play was, Mr. Rossow, on the occasion that you refer to, namely, about a year ago, when these people were present and inspected it, and you attended that inspection?

A. It was measured several times.

Q. Who measured it, as you remember?

(Testimony of Herbert Rossow.)

A. I think the gentlemen right here measured it (indicating).

Q. That is Mr. Hudson, and do you remember what he used to measure it with? A. A ruler.

Q. It was your ruler? Do you remember his measuring the arc or the width of play of the tongue at the bottom? [512] A. Yes.

Q. And what measurement do you remember that was made that you observed?

A. I observed it was four inches.

Q. And how was the ladder set for that to be done?

A. Just, it was setting on a table saw that represents this position right now.

Q. I see. Is there any change in the condition of that ladder—and make whatever inspection you wish to make of it now, Mr. Rossow—that appears to you to be different from that condition as it existed on the occasion to which you refer.

A. Well, I have seen the ladder practically every day for the last year, it has been moved around in the warehouse there, but I cannot see any change in it at all.

Q. Now, I direct your attention, Mr. Rossow, to the bolt at the top. A. Which?

Q. Do you discover any washers?

A. Yes, there is two washers on this side, and one on this side (indicating).

Q. What do you remember, Mr. Rossow, of your own independent recollection concerning the presence or absence of those washers?

(Testimony of Herbert Rossow.)

A. Those washers were on there when the ladder was brought [513] in.

Q. You know that? A. Yes.

Q. Now, the play of the tongue, as you have demonstrated, being more to the right as I am sitting at the bottom of the ladder, with the ladder turned over and the tongue on top, that was the condition, was it, at that time, more to that side than the other?

A. Yes, it was measured several times down here during the course of the examination down there, and I can recollect that it was four inches play, at least four inches.

Q. I see. Now, do you remember any other measurement that was made by anyone present on that occasion about a year ago?

A. No, I don't remember of any other measurement.

Mr. Splawn: I see. You may resume the stand.

(Whereupon, the witness resumed the stand.)

Mr. Hudson: Just leave it there.

Mr. Splawn: All right.

Q. Now, have you been present at your plant when Mr. Brazil and Mr. Hovde, of Selah, and Mr. Clark of the lower valley, have been there to examine and test the ladder? A. Yes.

Q. And did you observe what they did?

A. Yes, I observed what they did. [514]

* * * * *

Q. At the times that those gentlemen were at your place of business and examined the ladder,

(Testimony of Herbert Rossow.)

what did you observe [515] concerning the condition of that ladder and including the play of the tongue? A. Will you state it again?

Q. When the men to which I refer were out to your place of business and examined the ladder, you state that you saw them examine the ladder, I am not asking what they did; what about the condition of that ladder on the day those gentlemen were out as compared with it now, as you observed it?

A. Well, it's in the same condition as it was then.
* * * * *

Q. Directing your attention, Mr. Rossow, to the play in the tongue of this particular ladder, when that ladder is properly set does that play, or even any more play in that ladder, have any effect upon the safety of the ladder, if it is properly set.

Mr. Hudson: Before you answer that, Mr. Rossow, I am going to object to that because he hasn't been qualified to know how you set a ladder or whether it is safe or anything else. He has been qualified as a repairman and manufacturer.

The Court: Well, I will overrule the objection. It goes to the weight of his testimony and admissibility.

Q. (By Mr. Splawn): Do you understand the question?

A. If a ladder is properly set you will find that your steps are on a level position, the steps in between the siderails are on a level position if your ladder is set correctly. And if a ladder is set correctly it doesn't make any difference how much looseness is up in the top there, you can take the

(Testimony of Herbert Rossow.)

nuts clear off of that and bolts, if you want to, and it will still be just as safe as it is with the nuts on.

Mr. Splawn: That is all. [523]

Cross Examination

Q. (By Mr. Hudson): Mr. Rossow, when did you arrange with Mr. Splawn to give your testimony today?

A. I don't rightfully remember.

Q. Sir?

A. I don't remember just when it was.

Q. Did he arrange with you to give your testimony today? A. Pardon?

Q. Did he arrange with you to give your testimony today?

A. I was subpoenaed and I was called today, yes.

Q. And have you discussed this matter with Mr. Splawn since the recess of court at twelve o'clock today? A. No.

Q. You haven't discussed it with him at all?

A. I have talked to him, but I haven't discussed the ladder with him.

Q. You didn't even talk about the ladder?

A. No, sir, he just told me that I was supposed to appear here at one-thirty.

Q. And said nothing else? Now, were those instructions given you after twelve o'clock today to be here at one-thirty? A. Yes.

Q. Now, this ladder was delivered to you, you say, a year [524] or so ago?

(Testimony of Herbert Rossow.)

A. It was picked up and brought down to the warehouse there, yes.

Q. And it has been in your care even since?

A. Yes.

Q. Now, when was this ladder picked up from your place?

A. I believe it was Monday morning.

Q. Of this week? A. Yes.

Q. Do you know what time?

A. At eight o'clock.

Q. About eight o'clock? And you have no knowledge as to whether the ladder was brought directly here or not, have you?

A. No, I have no knowledge of it.

Q. Now, you have stated that you recall the circumstance of Mr. Mullins and Miss Loveland and myself coming to your place of business about a year ago or so ago? A. Yes.

Q. Now, isn't it also true that Mr. and Mrs. Wong were with us? A. Yes.

Q. And we arrived there before Mr. Splawn arrived, isn't that right?

A. If I remember rightly, you rode out with Mr. Splawn. [525]

Q. Well, that isn't my recollection but I don't believe it makes any difference. And you got the ladder out for us and we tipped it over over a saw-horse, isn't that correct?

A. Over a table saw-out there.

Q. A table-saw, whatever it may have been. And I borrowed a steel rule from you?

(Testimony of Herbert Rossow.)

A. That is right.

Q. Now, you recall very distinctly my measuring the play in the tongue? A. Yes.

Q. And you have arrived, or your memory is refreshed, or something, as to what you feel was the distance of the swing?

A. I remember, I am positive that the swing in that ladder, because you measured it several times, not just once but several times, and if my memory hasn't failed me completely, I think you said four inches play in it there.

Q. Now, do you remember me measuring, what do you call this, a hinge or a yoke?

A. That is the back leg hinge.

Q. The back leg hinge? A. Yes.

Q. Do you recall me measuring some distances on this hinge?

A. You measured something there but I just don't remember [526] what you measured there, but I do remember measuring on the bottom there.

Q. Well, you remember measuring on the top, too, don't you?

A. Yes, you measured there, but I couldn't figure what you was measuring there.

Q. And I was measuring a gap between the side of the hinge and the side of the plate on the leg of the ladder, wasn't I? A. Yes.

Q. And I was measuring the amount of play that there was in this bolt compared to the hole here, wasn't I (indicating)? A. Yes.

(Testimony of Herbert Rossow.)

Q. And do you recall me stating "I would give a lot if I could take that apart"?

A. No, I can't say as I recall you saying that.

Q. But you do recall me measuring these two items?

A. You measured something up there, I wasn't right up there with you when you measured it.

Q. Do you recall the distance that I gave of the play?

A. No, the only thing I remember is the four inches play at the bottom of the ladder.

Q. Now, was that four inches to the left as I stand looking at the ladder, or four inches to the right?

A. Four inches to the right, I believe. [527]

Q. Are you sure? A. Yes.

Q. That it was four inches to the right? What was it to the left?

A. I don't remember on that. There was a radius of about six inches, I believe, over-all there where it goes back and forth, so that would leave about two inches to the other side, but I can't truthfully say what it was.

Q. But you are totally certain it was four inches to the right? A. Yes.

Q. That is your memory of it?

A. Yes, I never wrote it down, or anything.

Q. You don't recall me saying, "There is three-sixteenths inches on each side"?

A. No, I do not.

Q. Or in the bolt latitude?

(Testimony of Herbert Rossow.)

A. You commented on the size of the bolt, I remember that.

Q. But you don't recall the specific distance?

A. No.

Q. I wish you would step down here just a moment, please, and I wish you would observe, maybe you had better stand over there so that the jury can see, also; I wish you would observe where the side of the hinge joins the side plate on the ladder on either side, with a standard rule, [528] there is no way that that gap could be measured, is there, it's too small?

A. No, it's too small.

Q. You would have to have some kind of a fine instrument? A. Yes.

Mr. Hudson: Thank you, that is all.

Redirect Examination

Q. (By Mr. Splawn): Now, with respect to the over-all play of this tongue, Mr. Rossow, would you say it's any different today from what it was on that occasion or any other occasion when you examined the ladder?

A. I can't see any difference in it, myself. Like I say, it has been picked up, I picked it up several times and moved it, in order to move something in or out of the warehouse down there, and I cannot see where it has changed in any way, shape or form than it was the day that it was brought in. [529]

* * * * *

LOUIS C. MORITZ

called and sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

Q. (By Mr. Splawn): Your name is Louis Moritz? A. Yes, sir.

Q. Where do you live? A. Zillah.

Q. And in what business are you engaged?

A. Pardon?

Q. In what business are you engaged?

A. Farmer, fruit farmer.

Q. Fruit farmer? A. Yes, sir.

Q. How long have you been a fruit farmer in the Yakima Valley? A. Since 1927.

Q. And what varieties of fruit have you grown, Mr. Moritz? [530]

A. I could almost say all varieties. Do I have to name them individually?

Q. No. Now, what offices or directorships have you held in organizations connected with horticulture?

A. Well, I have been and am a member of the Washington State Fruit Commission.

Q. You are now a member?

A. Yes, and a member on the Board of the Bartlett Pear Association since its original inception; and for two years I was the State Fruit Committee Chairman of the Washington State Farm Bureau. Offhand, that is all I can think of.

Q. What experience, Mr. Moritz, have you had

(Testimony of Louis C. Moritz.)

with fruit-picking ladders in the Yakima Valley and how they worked and operate?

A. Well, I can't say unlimited, but I can almost say that because I have harvested fruit on three different ranches all in one year, starting with, well, I harvested the pears and apples on two different ranches several times; the apples three times; and have had cherries almost consistently since I have farmed, so I have had practically a lot of use with ladders, if that is what you are referring to.

Q. And has that been in the Yakima Valley?

A. Entirely in the Yakima Valley. [531]

Q. What is your familiarity, if any, with ladders generally used in the Valley?

A. Well, I haven't had tremendously big crews in harvesting, but I have had, possibly, up to ten pickers and I have never had a foreman. I have had a man that works for me and he just kind of substituted when I wasn't there as foreman, so I have been entirely in charge of the help that I have hired in harvesting.

Q. And what about other places other than your own?

A. Well, I have harvested other places for men that I harvested for, they would be doing something else and, for instance, with my foreman, I used to harvest his place along with my place. He was working at a warehouse and I would harvest his crop along with my own crops. I hired the help and I fired the help, I furnished the equipment.

(Testimony of Louis C. Moritz.)

Q. What do you personally know about the use of a ladder and how a ladder operates and works?

A. Well, I would assume that I could tell whether a ladder was able to be used or not able to be used. I wouldn't want to put a picker on a ladder that I thought there was something wrong with.

Mr. Hudson: If the Court please, that isn't quite responsive to the question.

The Court: No, I don't think it is entirely [532] responsive.

Q. (By Mr. Splawn): What I am getting at, Mr. Moritz, is this: what experience you have had, personally, in the use of ladders and how they work and how they operate and what you can do with them and what you can't do with them?

A. Well, I have used a lot of ladders in my time, so that the only thing I can tell you is that I have used a lot of them myself, not only for my help but for myself.

Q. Have you examined a ladder that belonged to Walter Swier, of Cowiche?

A. Yes, he called me up one time and wondered when I was coming to Yakima and I said I didn't know, that was somewhere around close to noon.

The Court: I think the answer is "Yes," you have examined it?

A. Oh, excuse me, yes.

Q. (By Mr. Splawn): Now, directing your attention to this ladder that is down here between you and me, do you recognize that as the ladder which you examined?

(Testimony of Louis C. Moritz.)

Mr. Hudson: Well, to save time, I will say that it was the ladder.

The Court: All right, let's assume that it was.

A. I never looked at it, I just come in here and never did pay any attention except step around it, I assume it's [533] so.

Q. (By Mr. Splawn): And when was it that you examined this ladder?

A. You say "when was it?"

Q. Where was it?

A. Up at the Independent Ladder Company on Fruitvale Boulevard, or just off of Fruitvale Boulevard.

Q. It has been said to be the Dependable Ladder Company.

A. That is it, the Dependable Ladder Company.

Q. And how much of an examination did you make of it, what did you do in your examination of this ladder?

A. I picked up the ladder and set it out just like I would if I had the ladder myself, tried it out, went up to the ninth step. I asked you what was wrong with it. You said, "I am asking you."

The Court: Just a moment, that is not admissible what you said or what he said to you, just what you did, please.

A. Excuse me. I looked the ladder over. I went up it and went back down.

Q. (By Mr. Splawn): Did you find anything about the ladder that would make it unsafe to properly set and use?

(Testimony of Louis C. Moritz.)

A. Safety? I didn't think so.

Q. Did you observe any play in it?

Mr. Hudson: Now, just a minute, let's let him [534] testify.

Q. (By Mr. Splawn): All right, what, if anything, do you observe concerning any play in the tongue of the ladder?

Mr. Hudson: Now, just a minute, let's let him testify, not ask where the play was. If you want to testify, be sworn.

Mr. Splawn: It's already there, I mean, we are not quibbling.

The Court: You can ask him what, if anything, unusual he found about the ladder, I think, would be a fair way to put it.

Q. (By Mr. Splawn): Did you find anything unusual about this ladder different from other ladders?

A. When I looked at the ladder, the first thing I looked at was how loose the steps were. I found they were not, they were tight all along. I started to throw the ladder out and I noticed the pole had a little sway back and forth; to me, that was not unusual because I have had a ladder tight at the top and my picker has loosened it so he could move the pole around a limb when he would use it, so I tried it. It was on solid ground where I could set the pole straight ahead. I threw the pole out, it went straight ahead. I crawled up the ladder and crawled back down. I told you, as far as I could see, the ladder was safe. [535]

(Testimony of Louis C. Moritz.)

The Court: That last remark will be stricken and the jury instructed to disregard it. We have rules against hearsay, Mr. Moritz, about something that was said out of the parties' presence, a rule of evidence.

Mr. Splawn: I was talking to the witness, I am sorry.

The Court: I beg your pardon.

Mr. Splawn: I am sorry to interrupt, I thought you had finished, your Honor.

Q. What opinion did you arrive at, not what you told me, but what opinion did you arrive at after testing the ladder in that fashion?

A. I assumed the ladder would be safe enough for me to put a picker on.

Q. Now, with respect to the top of the ladder, incidentally, would you step down, Mr. Moritz? You haven't seen this ladder since you were out here?

A. No, sir.

Q. That has been how long ago?

A. I would say, approximately three weeks ago.

Q. I see, will you look at the ladder and test the tongue in any way you see fit to demonstrate any play?

A. (Witness examines ladder.)

The Court: It isn't questioned that there is any play in the tongue or steps, Mr. Moritz, you needn't waste any time on that. [536]

Q. (By Mr. Splawn): There isn't any claim of that. Now, when you were out there did you observe the play which you just indicated in the tongue?

(Testimony of Louis C. Moritz.)

A. Yes.

Q. As you recall, is there anything about that ladder that is different now than it was then?

A. (Witness examines ladder.) I don't think so. No, I don't believe so.

Q. All right, you may resume the stand. Assuming this ladder were set properly and the tongue centered and placed in the center of the ladder and on disked ground, practically level, and a person, let's assume weighing around 150 pounds with a bag about half full of apples, standing on the eighth rung with both feet on the rung and that person turning the body slightly to the right in order to ease the pressure of the bag of apples on the frame of the ladder, and that was all, not reaching to one side or to the other, can you see any conceivable way how that ladder could tip under those circumstances?

A. I certainly do not.

Q. Well, in order to make this ladder tip or collapse or move in some way when it is set properly, what would have to happen to cause that?

A. Well, I would say it's possible for the weight of your apples to shift you off balance. It would not be hard [537] to do that if a person is not careful, you could, the weight of the apples in your sack if you are not against the ladder, it would be possible if the weight shifted that you could go sideways.

Q. Would that be because of the ladder, itself?

A. I wouldn't think so, I would say "no."

Q. What about reaching to one side or the other, I mean, the picker's own movements on the ladder,

(Testimony of Louis C. Moritz.)

what effect can that have upon the ladder's tipping or this ladder's tipping or collapsing in some way?

Mr. Hudson: Now, if the Court please, I don't believe that item is in question about what the picker does when he gets out over here (indicating). There is no testimony before the jury relative to that. I believe the question is totally irrelevant.

The Court: I will overrule the objection.

(Last question read.)

A. Well, I would say this ladder should not collapse unless you overbalanced. Unless you shifted your own weight too far sideways, and I believe that could happen with any ladder, no matter what ladder it would be.

Q. (By Mr. Splawn): Even a brand new one?

A. That is right, no matter what ladder it would be I think it would still do the same thing.

Q. Can you set up a ladder and not get on it, set it up [538] properly and center the tongue and push on one side and make it cramp?

A. I certainly can.

Q. Well, can you do that with a brand new ladder that has never been in use and it is tight at the top?

A. I can after I have used it a while because it is going to get in shape that it can.

Q. I see, well, with weight on the ladder, that is, the type of weight that I indicated and up toward the top as far as I indicated, is there anything that can cause the ladder to tip or collapse or fall over because of any play or looseness at the top?

(Testimony of Louis C. Moritz.)

A. I would say not unless your weight shifted and caused it to overbalance and I would say that would be my fault if the weight over-shifted or shifted to cause the ladder to fall.

Q. Would it be more apt, would this ladder be more apt to do that than a brand new ladder, that is, if you broke it in yourself?

A. I would say, yes, I would have to say yes.

Q. Now, so far as ordinary picking activities are concerned upon a ladder, that is, picking fruit from a ladder, is there anything about this ladder that would make it unsafe so far as the ordinary picking is concerned, reaching for the apples and putting them in your bag and [539] coming down, was there anything unusual about this ladder?

A. I would say no.

Q. Would you have any fear to use this ladder yourself?

Mr. Hudson: I object.

The Court: I will sustain the objection to that, that isn't a question.

Mr. Splawn: That is all.

Cross Examination

Q. (By Mr. Hudson): Mr. Moritz, I noticed when you inspected the ladder you picked the tongue up and moved it and you were quite observant about the hinge up at the top, you were hesitant about your answer; did you think there was anything unusual about that hinge?

A. About this ladder?

(Testimony of Louis C. Moritz.)

Q. This hinge here (indicating) ?

A. This ladder is loose right at the top, I know that.

Q. Yes, now, I will give you a hypothetical case, please, Mr. Moritz: three-sixteenths of an inch is pretty near the width of that pencil, isn't it?

A. Approximately.

Q. Now, may we assume there is a three-sixteenths inch play on each side of the hinge this way (indicating) ? [540] A. Yes.

Q. And there is, approximately, the same amount in this bolt, that is, in the hole compared to the bolt? A. Yes.

Q. Assuming those facts in your opinion would that make a difference in the stability of the ladder so it would twist more?

A. I would say, well, I would answer that, yes.

(Last question and answer read.)

Mr. Hudson: I am through.

Redirect Examination

Q. (By Mr. Splawn): Had you finished, counsel?

Mr. Hudson: Yes.

Q. (By Mr. Splawn): Now, that would increase the play, would it, Mr. Moritz?

The Court: Just a moment, that is a leading question, if you want to ask him in what respect it would make a difference, all right.

Q. (By Mr. Splawn): Yes, in what respect

(Testimony of Louis C. Moritz.)

would it make a difference so far as the safe use of the ladder is concerned?

A. I wish I could demonstrate by using the ladder.

Q. Would it make any difference? [541]

A. If the ladder was as tight as the gentleman stated my picker wouldn't have that ladder very long.

Q. Well, did you understand counsel's question?

A. I certainly did, but a ladder in use for my picker cannot be so tight, throwing it forward, that the pole will not shift a slight amount back and forth so he can put it through limbs or around limbs, that is the idea that a picker likes to use, is that they can move the pole and not have it go, they will set the ladder up, for instance, and take the pole and move it one way or the other to get it around the limb. If it is like a new ladder, for instance, personally, my pickers do not like new ladders until they get loosened up because they are too tight where the pole fits in the top of the ladder until they have been used a little bit to make that pole move a little when it is shoved ahead.

Q. Well, if you provide more looseness than there is now, would that make any difference?

A. That is the way a picker would want it, so they could move it one way or the other. You have the pole over there.

The Court: I think that has been explained. Let's have question and answer procedure here, please.

(Testimony of Louis C. Moritz.)

A. I am trying to.

The Court: Answer his questions and he will ask you [542] the questions. You have gone far beyond his questions in many cases here. Go ahead.

Q. (By Mr. Splawn): Even if this were looser than it actually is now, would that make this ladder unsafe?

A. No, definitely not, it would not make that ladder unsafe. [543]

* * * * *

WALTER SWIER

the defendant, recalled as a witness in his own behalf, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. Splawn): Walter, when you were out with Mr. Kent Wong to see the ladder after the accident, you referred to that occasion I believe, yesterday, did you yourself do any specific measurement? A. Yes, sir.

Q. Will you describe what you did?

A. Oh, I had the usual pocket rule, steel rule, with me. We went to the ladder there, it was laying, oh, I would say on its back; in other words, it was laying flat with the third leg on top of the steps. We centered it and then I would move it to the right and to the left.

Q. Was he there? A. He was there.

Q. And how did you measure that, what measurement did you make? [548]

A. Well, from the central point I moved it over

(Testimony of Walter Swier.)

four inches to the right, that is, facing it, with the leg up and approximately three to the left.

Q. I see. Well, during the course of the trial have you had any occasion to test the ladder and the play in the tongue? A. Yes, sir.

Q. Well, Walter, you found what was the comparison?

A. Oh, it's almost identical. I haven't measured, but just, you know—well, I know how much four inches is, or an inch is.

Q. I see.

A. I can see no appreciable difference whatsoever.

Q. One other question. Well, so far as any other feature of the ladder is concerned, and you have observed it during the trial, have you not?

A. Yes, sir.

Q. Well, have you found anything different about the ladder in any respect from what it was while it was still on the place and before it went to Dependable ladder?

A. I would say it's identical.

Q. When you gave the ladder to the Wongs at the beginning of the apple picking, I believe you testified that you gave them their ladders?

A. I did. [549]

Q. Do you remember mentioning anything to them concerning the use of the ladder, and if so, what was it?

A. Well, I always mentioned to all pickers when they start out, if there was anything wrong or they

(Testimony of Walter Swier.)

break a bag, or anything wrong with a ladder, sometimes a step breaks, to use another one and I would replace it.

Q. Was any report made to you concerning this ladder or any other ladders?

A. No, sir, nothing spoken of a ladder.

(Last question and answer read.)

Mr. Hudson: Thank you.

Q. (By Mr. Splawn): If there had been a report on this or any other ladder, from the one using it, that there was something wrong with it, what would have been your reaction to that?

Mr. Hudson: To which, of course, we object.

The Court: I will sustain the objection.

Q. (By Mr. Splawn): May I ask you, would it have been repaired?

The Court: I will sustain the objection to that line of testimony.

Mr. Splawn: That is all.

Cross Examination

Q. (By Mr. Hudson): Yes, sir, I believe you testified that you have been in [550] the apple business since about 1927, is that correct?

A. Oh, prior to that.

Q. Prior to that? A. Yes, sir.

Q. Now, what organizations have you been connected with which are affiliated with the fruit growing industry?

A. Oh, the Washington Cannery, Cowiche Grow-

(Testimony of Walter Swier.)

ers, State Horticultural Association, Washington State Horticultural Association.

Q. Any others?

A. At the moment it doesn't come to mind.

Q. Have you held in those organizations any positions? A. Yes.

Q. What were those positions?

A. Well I have been a Trustee of the Cowiche Growers for a period of years.

Q. Any others?

A. Yes, sir, I am currently also a Trustee in the Washington Co-operative Cannery.

Q. Any others?

A. Well, I am a member of the State Horticultural Association; that don't have any bearing on this.

Q. Well, whether it has a bearing or not, why, tell me of any other organization that you are connected with?

A. In connection with fruit production? [551]

Q. Anything connected with fruit, whether it is fruit production, fruit growing, fruit pruning, spraying, any organization.

A. Only indirectly as it affects the other organizations.

Q. Well, what are those?

A. Well, there would be, for instance, the Yakima Valley Spray Plant, and as a member of the Cowiche Growers. I am also affiliated indirectly with a Co-operative in Wenatchee. They don't know it, perhaps.

(Testimony of Walter Swier.)

Q. Any others?

A. At the moment I can't think of any.

Q. Now, those organizations that you have named have been also named by, or some of them have been named by Mr. Clark, as an organization that he was connected with, is that not true?

A. That is true.

Q. And Mr. Brazil?

A. No, I have no connections with Mr. Brazil.

Q. I am asking if you have a connection with him?

A. With the organizations to which he belongs, sir, that is what I mean.

Q. And with Mr. Hovde?

A. None whatsoever.

Q. Now, do you know Mr. Clark?

A. Yes, I do. [552]

Q. You have known him for some time?

A. Oh, a year and a half, perhaps.

Q. That is all?

A. Yes, that is true, I only first met him, personally.

Q. You have known of him for some time previously?

A. I have known of him because he was a State Legislator and his name is very prominent in the news.

Q. And do you know Mr. Brazil?

A. No, sir, I never met him or never saw him, to see who he was, until yesterday.

Q. Do you know Mr. Hovde?

(Testimony of Walter Swier.)

A. No, sir, I never met him until yesterday.

Q. Does Mr. Hovde belong to some of the organizations that you testified to?

A. No, sir, none of them. He is prominent in the Farm Bureau.

Q. Sir?

A. I say, he has been prominent in the Farm Bureau.

Q. Have you got anything to do with that?

A. No, I am not a member.

Q. But all of these men are orchard growers or orchard men here in the Valley? A. Yes, sir.

Q. And, generally speaking, all orchard men in the Valley are acquainted or know of other orchard men in the [553] Valley, do they not?

A. Oh, the more prominent ones, perhaps.

Q. Now, do you know Mr. Moritz?

A. What do you mean?

Q. Who testified here yesterday?

A. Moritz? I have no recollection.

Q. Would that be a correct name?

Mr. Splawn: Moritz, it's with a "Z," counsel (spells) M-o-r-i-t-z, wasn't it?

A. No, sir, I do not know him.

Q. (By Mr. Hudson): Do you know Mr. Ros-sow of the Dependable Ladder?

A. No, sir, I do not. I never met him until yesterday out in the corridor. I didn't meet him then, I beg your pardon.

Q. You use Dependable ladders?

(Testimony of Walter Swier.)

A. I do. This is a Dependable ladder (indicating). [554]

* * * * *

DAVID SWIER

called and sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

Q. (By Mr. Splawn): Your name is David Swier? A. Yes.

Q. And you are related to the defendants Walter and Laura Swier, are you? A. Yes, sir.

Q. And you are a son? A. Yes, sir.

Q. An adopted son? A. Yes, sir.

Q. And you live where, David?

A. On the Swier ranch.

Q. And how old are you?

A. Thirty-six.

Q. Married? A. Yes, sir.

Q. In October of 1955 state where you were living? A. On the Swier ranch.

Q. And where were you then employed?

A. By my father.

Q. Do you remember the occasion of an accident on your [555] father's place in October, 1955?

A. I do.

Q. And was that the accident of Rose Wong?

A. Yes.

Q. Was she then living on the place?

A. Yes.

Q. Do you, yourself, of your own independent

(Testimony of David Swier.)

recollection, remember the date of the accident?

A. Yes, I do.

Q. And what was the date?

A. Well, I was picking apples three or four rows over from her.

Q. I will ask you if you remember the date of the accident?

A. Oh, the date was in October, I think it was about the 17th.

Q. I see. Did the accident happen in the morning or the afternoon, that you recall? Well, perhaps you don't recall the time?

A. It was in the morning.

Q. What? A. In the morning.

Q. In the morning? And where were you when the accident happened?

A. Picking in the same orchard.

Q. I see, and about how far removed from the place where [556] the accident occurred?

A. About three rows over.

Q. And do you remember in which direction, David, you were?

A. Well, I was southeast from there.

Q. I see, southeast of the tree where the accident happened, you mean? A. Yes.

Q. What was it that first brought to your attention that an accident had occurred?

A. Her daughter started running across through the orchard hollering, and I heard her and asked her what was wrong and she told me, so I immedi-

(Testimony of David Swier.)

ately dropped everything and went over to see what was wrong.

Q. Did the daughter say an accident, what was it?

A. She said her mother broke her leg.

Q. What did you do then?

A. I immediately dropped everything and went over to see what happened, and she was lying on the ground.

Q. I see. When you arrived there who was there? A. Her husband.

Q. Do you remember anybody else being there?

A. No.

Q. Did other people come up later?

A. Yes, they did.

(Last question read.) [557]

Mr. Splawn: It was leading, your Honor.

The Court: Well, that is all right.

Q. (By Mr. Splawn): What did you observe about the ladder when you arrived there?

A. The ladder was tipped, it was over, the tongue was over a pile of apples, boxes full of apples.

Q. How big was this pile of apples that the tongue was over?

A. About six to nine boxes.

Q. And how high were they stacked?

A. They were three high.

Q. And the legs of the ladder, where were they with reference to this pile of boxes?

(Testimony of David Swier.)

A. They were on one side of the boxes, the tongue on the other.

Q. Was the ladder on the ground?

A. No, leaning against the limb.

Q. Against a limb? A. That is right.

Q. Now, when you arrived there did Mrs. Wong say anything concerning what had happened to her and, if so, what did she say?

A. I don't know the exact words, something about, something on the order of reaching too far and falling and striking her leg on the box. [558]

Q. I see. Did you ever have, yourself personally, any later conversations with Mrs. Wong concerning the accident? A. No.

Q. As you recall, what became of that ladder?

A. It was picked up later.

Q. Well, did it remain in the orchard after that time or was it taken some place first?

A. I believe it was taken in.

Q. Did you, after the accident any time and before the ladder left the place, examine the ladder?

A. Yes.

Q. That was while the ladder was still on the ranch? A. Yes.

Q. Now, have you ever had an opportunity to examine the ladder since that time? A. No.

Q. You have been in attendance as a witness now in court, have you, for several days?

A. Yes, sir.

Q. Have you been in the courtroom?

A. No, out in the corridor.

(Testimony of David Swier.)

Q. Who prepared the ladders on the Swier ranch for the harvest period? A. I did. [559]

(Whereupon, the ladder was brought forward to the jury box.)

Q. David, I am showing you the ladder in question, there is no argument about that, and I would like to have you step down and examine this ladder in whatever way you see fit, and I particularly direct your attention to any looseness or play in the tongue, and I would like to have you look at the assembly at the top, and bolts or nuts that are affixed to the top. Did you examine the other side, too? A. Yes, I did.

Q. Now, I am going to ask you this question, David: is there anything about this ladder—

The Court: (Interposing) Pardon me, respecting the ladder I think it would be easier if he would get back here (indicating). The jury can hear him better. He has inspected the ladder.

Q. (By Mr. Splawn): Is there anything about this ladder different than the way it was when it was on the place and before it left the ranch?

A. No different.

Q. Now, I don't know whether you took any notice or not but at the top of the ladder where those bolts go through, did you observe anything besides a nut? A. Yes, sir, a washer. [560]

Q. What? A. A washer.

Q. What do you know about washers?

A. They were put on there at the time to keep them from turning.

(Testimony of David Swier.)

Q. Who put them on, David? A. I did.

Mr. Splawn: Your witness.

Cross Examination

Q. (By Mr. Hudson): Did you discuss this ladder with anyone since yesterday?

A. Only with Mr. Splawn. The fact that—

The Court: (Interposing) Well, you have answered the question.

A. All right.

Q. (By Mr. Hudson): Did you, personally, Mr. Swier, ever make any measurements on that ladder? A. No, sir.

Mr. Hudson: I think that is all.

Redirect Examination

Q. (By Mr. Splawn): Well, counsel has asked you if you discussed the ladder with me. When was it? [561] A. This morning.

Q. And what did I ask you?

A. On the condition of the ladder at the time that I saw it.

Q. And what else did I ask you?

A. Whether the ladder was safe.

Mr. Hudson: Pardon me?

(Last answer read.)

Q. (By Mr. Splawn): Did I not further ask you if you got in the courtroom you were to test that ladder and make a comparison?

The Court: I think that is leading and I don't

(Testimony of David Swier.)

believe that counsel's interrogation permits you to go into the whole conversation.

Q. (By Mr. Splawn): Was there anything in our discussion this morning in any way that I indicated to you what your testimony was to be?

A. No, sir.

Mr. Splawn: That is all.

Recross Examination

Q. (By Mr. Hudson): Did you discuss the ladder with your parents last evening?

A. No. [562]

Q. Yesterday afternoon? A. No.

Q. This morning? A. No.

Q. Did you see them yesterday?

A. Yes, sir.

Q. Did you see them this morning?

A. Yes, sir.

* * * * *

LAURA SWIER

the defendant, called and sworn as a witness in her own behalf, testified as follows:

Direct Examination

Q. (By Mr. Splawn): You are Laura Swier?

A. I am.

Q. And one of the defendants left in the case?

A. Yes, sir.

Q. Your husband is Walter Swier?

A. Yes, sir.

(Testimony of Laura Swier.)

Q. And you live with him, do you, in Cowiche?

A. Yes, I do. [563]

Q. And, of course, you know Mrs. Wong?

A. Yes, I do.

Q. And that has been through, briefly, what contact and connection?

A. Well, she has been a missionary friend for many years, and a personal friend in the last, almost thirteen years.

Q. Did the Wongs ever live on your place?

A. Yes, sir. .

Q. And they came to your place to live about what time of year?

A. Well, the children, Richard came to live on our place for a couple of months in 1954, in late May, and stayed a couple of months. We took him back home when we were going on a trip in Idaho, and then in the fall of that same year the three older children, Richard, Rosemary and Marjory came to live with us while their parents expected to go to China, and when they didn't go, Mr. and Mrs. Wong came in I think it was late June or the first of July, to stay with us until further plans were made for their future.

Q. And they continued to live on your place, then, until about what time, what year?

A. They stayed with us until, I think it was along late April or the first of May, in 1956.

Q. Do you remember the occasion of an accident? [564]

A. Yes, I do.

Q. And what month was that, or the date, if

(Testimony of Laura Swier.)

you know; you probably know the date, don't you?

A. It was on Monday, October 17th, nearly eleven o'clock.

Q. And where were you when you first learned about the accident?

A. I was in the kitchen and Marjory came running and screaming, "Mother broke her leg, Mother broke her leg, call the doctor."

Q. And Marjory, I suppose, is one of the Wong children?

A. Yes, Marjory is the second daughter.

Q. Did you thereafter visit with Mrs. Wong and see her?

A. Yes, I saw her every day in the hospital for the first month, and then quite often after that.

Q. I see. As you recall, Laura, when did Mrs. Wong return from the hospital to your place?

A. I think it was December 13th, I know it was a couple of weeks before Christmas.

Q. I see. Were they there Christmas?

A. Yes, they were in our home Christmas day.

Q. You had dinner for them? A. Yes.

Q. After, did you ever have any conversations or conversation with Mrs. Wong, or inquire what happened? A. Yes, very often. [565]

Q. And that would be over what course of time or what period of time, would you say?

A. Oh, after she began to improve in the hospital, we talked about it, and then also after she returned home we were over there every day.

(Testimony of Laura Swier.)

Q. Well, did you ask her how the accident happened?

A. Yes, I did ask her if she could recall how it happened. I know it is hard to remember in the confusion what does happen.

Q. What did she tell you had happened? How did she describe what happened?

A. She told me she had been reaching for some apples, she started to step down when she felt the ladder give. She immediately knew she had to get off of it, and when she started to climb down, she fell.

Q. And what did she mention about the apples?

A. Well, that there wasn't many left on the tree and that she wanted to finish the tree, is all I can remember.

Q. Did she ever indicate where she was on the ladder when she fell?

Mr. Hudson: Now, if the Court please, just let this lady tell what conversation took place.

The Court: I think the proper way is to ask her what the conversation was and what all of the conversation was. [566]

Q. (By Mr. Splawn): Give all the conversation, Laura.

A. Well, I just can't, I couldn't recall all the conversations all the time. We talked about it several times, but I know one morning we were talking about it and I spoke to her and I said, "We did find some looseness in that ladder, Rose."

(Testimony of Laura Swier.)

Q. You told her that there was some looseness in the ladder? A. Yes, I did.

Q. Yes, and incidentally, Mrs. Wong testified to an occasion between three and four weeks after her entry into the hospital and in the hospital room where you were, and you had made a statement to her concerning the ladder. I ask you what you just said, was that the occasion?

A. Yes, that was one of them. There was one more, about nine o'clock, she had her youngest daughter, Wendy, with her, and we went to visit her at the hospital.

Q. I see. Well, she testified that you said that there was something wrong with the ladder.

A. Well, I told her there was some looseness in the ladder.

Q. I see. Well, that was after, so far as you knew there was looseness in the ladder?

A. Yes.

Q. What else can you recall in your conversations with Mrs. [567] Wong about the accident and where she was on the ladder, or anything further that you remember that she said about this affair?

A. Well, we often remarked how she could get hurt so desperately and not fall any further than she fell. I don't know what else.

Q. Did she ever say how far she had fallen?

A. Well, I don't know as she said exactly how far, but, that I can recall, but we used to think she must not have fallen over four or five feet, how could she have gotten hurt so much.

(Testimony of Laura Swier.)

Q. Did she ever tell you what she fell on?

Mr. Hudson: Now, if the Court please.

The Court: I think it isn't necessary for you to suggest things to the witness.

Mr. Splawn: I am not trying to suggest, your Honor. These are various conversations over a period of time and I know the witness probably can't remember each one. I am merely asking her what she recollects about what was said on various occasions, apparently stretched over a period of time.

The Court: All right, you may answer that.

(Last question read.)

A. Yes, she fell on the ground, she thought she had wacked her ankle against the box. [568]

Mr. Splawn: That is all.

Cross Examination

Q. (By Mr. Hudson): When did you first meet Miss Loveland here, the lady here at the counsel table? A. Personally, or by telephone?

Q. Personally?

A. I don't recall the date, it was sometime in the summer or spring. Let's see, when was it? I think it must have been in the spring of '56, I am not sure, but it was in the spring.

Q. You met her here in Yakima or, rather, this vicinity?

A. Yes, I met her out at Cowiche at our place.

Q. She came out there? A. Yes.

(Testimony of Laura Swier.)

Q. At the time you knew she was a lawyer, at least you were advised of it? A. Yes.

Q. And you generally discussed this situation, did you not?

A. We discussed it a little. [569]

* * * * *

THOMAS K. HUDSON

recalled as a witness in rebuttal on behalf of the plaintiff, resumed the stand and testified further as follows:

Direct Examination

Q. (By Miss Loveland): Will you state your name, please? A. Thomas K. Hudson.

Q. And where do you reside, Mr. Hudson?

A. Denver, Colorado.

Q. And what is your profession?

A. I am an attorney with offices in Denver, Colorado, licensed to practice law in all the courts in Colorado and in all the Federal courts.

Q. Under your profession as an attorney and the practice of law do you have any other interest or business interest? [585] A. I do.

Q. And will you please tell me what they are?

A. Well, one of them is I have been connected with the manufacturing business for some period of years. I am also connected with the oil and gas business and I have been connected with the mining business. I have had a rather varied interest.

Q. I will ask you, Mr. Hudson, if the ladder which is in the courtroom now and which has, I believe, been designated as Plaintiffs' Exhibit 1, if

(Testimony of Thomas K. Hudson.)

you have ever prior to the commencement of this trial seen that ladder? A. I have.

Q. Can you tell me when?

A. The first time I saw this ladder was March 15, I believe, 1957.

Q. 1957? A. I believe that is correct.

Q. And where was the ladder at that time?

A. The ladder was at the Dependable Ladder Company here in Yakima.

Q. And was anyone else present at the time you viewed the ladder at Dependable Ladder?

A. There was.

Q. Who was there?

A. There was Homer Splawn, Mr. Rossow, if that is his name, [586] the gentleman who testified here yesterday, George Mullins, Alice Loveland, Kent Wong, Rose Wong, and there were two or three employees, or at least men around the Dependable Ladder Company that were there. I did not meet them and do not know their names.

Q. At that time and place, Mr. Hudson, did you make any inspection of this ladder? A. I did.

Q. Will you please tell me what you did?

A. Well, Mr. Rossow got the ladder and we put it down in a good deal the same position it is now, on a saw-horse, at which time I made an inspection of the ladder and made some measurements of the ladder.

Q. What measurements did you make?

A. (Witness approaches the ladder.) I believe at the time that I measured the tongue that we

(Testimony of Thomas K. Hudson.)

laid the ladder flat on the ground, with the tongue being uppermost. At that time the tongue would swing to my left as I faced the ladder, without resistance, between four and five inches. The reason I say between four and five inches is that down here (indicating) the tongue has been rounded off to a certain amount and it is difficult to just say exactly if it was four and a half or four and three-quarters. It would swing to the right, without resistance, between nine and ten inches, and by "without [587] resistance" I mean that there was no force necessary to swing it back and forth. It had a play of, oh, fourteen or fifteen inches total. I was particularly interested in what I have referred to as the yoke assembly, but have been advised that it is called the hinge assembly.

Now, to make that measurement down there I borrowed a steel tape from Mr. Rossow. I believe he testified yesterday he showed the tape that I had used. I also used that tape to make the measurements on the hinge.

Now, at that time there was a gap between the side piece of the hinge and the side piece attached to the ladder leg on each side, of three-sixteenths of an inch. There was also the same amount of play up and down on the bolt. There was three-sixteenths of an inch play there. At that time, referring now to the same side as I referred when I was standing facing the ladder on the left-hand side of this assembly, there are now two rather unusual washers. Those were not there at that

(Testimony of Thomas K. Hudson.)

time. At the present time these are pulled very closely together and there is no play sidewise, and if there is a play up and down it would have been restricted by the closeness of where it has been drawn up.

(Whereupon, the witness resumed the witness stand.)

Q. I believe you stated, Mr. Hudson, that you used a steel [588] measuring tape which you borrowed from Mr. Rossow to measure that play at the top of the ladder? A. That is correct.

Q. Can you take a steel tape and measure that play as the ladder is now?

A. There is no play there now, you couldn't get a knife blade in now.

Miss Loveland: You may examine.

Cross Examination

Q. (By Mr. Splawn): You are one of the attorneys of record, are you not, Mr. Hudson?

A. Yes, sir.

Q. And do you remember going out to Dependable Ladder Company on that occasion in my car?

A. I had rather thought yesterday that I had gone out in another car, but I now know that I did go out in your car, and I think it was raining, you picked me up at the Chinook Hotel.

Q. And that has come to you since yesterday?

A. Yes, sir.

Q. You hadn't recollected that?

A. I had thought that, I had been under the

(Testimony of Thomas K. Hudson.)

impression that we had gone out and that you were a few minutes [589] late, but that is not correct. I rode out with you and I believe Mr. Mullins rode back with you.

Q. That is correct. Now, when you were doing these measurements is it not a fact that Mr. Rossow was there with you observing what you were doing?

A. Not only Mr. Rossow was there, but you were there and you were just as interested as I was, apparently.

Q. That is correct.

A. (Continuing) And——

The Court: (Interposing) You should permit the witness to complete his answer. Had you finished your answer?

A. No, sir. The Wongs were there, and Miss Loveland was there.

Q. Yes.

A. Mr. Mullins was there, we were all interested in the condition of the ladder.

Q. (By Mr. Splawn): And is it not a fact that Mr. Rossow, when he loaned you his tape to measure with, that he was the closest one to you and watched and discussed with you, and you discussed with him, this ladder and what you were doing?

A. No, I don't think he was the closest one. Everybody was grouped around it. If there was a discussion it was with everyone. [590]

Q. And do you remember talking to Mr. Rossow on that occasion about the safety feature of the ladder?

(Testimony of Thomas K. Hudson.)

A. In the event I did, I don't recall it.

Q. You don't recall it?

A. I know that I made the remark to him, "I would sure like to take this ladder apart."

Q. Do you remember his mentioning to you after you had made an inquiry of him as to the safety of the ladder an answer that was very disappointing to you and you expressed surprise?

A. That could have been, Mr. Splawn. I am not going to tell you that it did not occur. I was deeply interested in the condition of the ladder.

Q. What is your financial interest in this case, Mr. Hudson?

A. Well, I will be happy to tell you my financial interest in this case: Miss Loveland and I and a Clarence Button have been associated in the law business for in excess of twenty years. When this situation arose Miss Loveland made a trip out here and, as has been testified to, talked with the Swiers. Now, I will tell you about this financial interest, I wanted to give you the background.

Q. Well, now, what is your financial interest at the present time in this case?

A. My financial interest in this is that regardless of [591] what the recovery is, if there is a recovery in this case, that I do not receive one dime.

Q. For your time? A. For my time.

Q. And your expenses out here?

A. My expenses out here. This, my participation in this hearing out here, is a courtesy to one Alice Loveland and I am sure that she would return the

(Testimony of Thomas K. Hudson.)

same courtesy to me and has on previous occasions.

Q. You don't expect to be reimbursed for your out-of-pocket expenses?

A. My hotel bill and plane fare and one odd thing and another, those are being paid for, but my services as a lawyer and what I term my out-of-pocket expenses, I will buy some dinners, some lunches, cigarettes, and what have you, I don't even keep track of it, but I assure you if there is a recovery here, regardless of its size, amount, or anything else, I will not receive nor will I accept one penny, and that is my arrangement.

Q. And even though you are associated with Miss Loveland in the law practice?

A. Even though I am associated with Miss Loveland in the law practice; and, incidentally, she will receive nothing.

Q. Now, when next did you examine this ladder?

A. The next time I saw the ladder, I can't give you the date, but it was, oh, some months ago.

Q. When is the last time you examined this ladder? A. Friday of last week.

Q. What about what you testified to concerning?

A. The condition was the same then as I testified to.

Q. Then it's your position that since last Friday this ladder has been changed in those respects?

A. My position is that this ladder has been changed in the last week.

Q. Since last Friday?

(Testimony of Thomas K. Hudson.)

A. That is right, as I recall, I saw the ladder shortly following lunch last Friday.

Q. Yes. Now, you were in my office later?

A. Along four or four-thirty in the afternoon.

Q. Yes, that was after, presumably, you had inspected the ladder?

A. There is no "presumably," I had inspected it.

Q. Well, at the time of your inspection it was after you were out there to inspect the ladder?

A. Yes, your associate met us out there.

Q. Yes, this last Monday when your witness, Mr. Chauncey McDonald, from the Department of Labor, went over the ladder with you, what was the situation then?

A. I wouldn't have any idea. [593]

Q. You went over that ladder with Mr. McDonald this last Monday when you talked with the witness, didn't you?

A. I did not go over the ladder with Mr. McDonald.

Q. Weren't you here when Mr. McDonald examined the ladder? A. I was.

Q. And worked the play or looseness in the tongue? A. I did not.

Q. Weren't you examining Mr. McDonald?

A. I examined Mr. McDonald, I did not examine the ladder.

Q. This last Monday, I take it, there was no change in that ladder, as you have suggested it, of which you were aware?

(Testimony of Thomas K. Hudson.)

A. I wouldn't know anything about that, I didn't inspect the ladder Monday.

Q. You saw your witness inspecting it, did you not? A. Our witness was here.

Q. Yes, and your witness had inspected this ladder before last Monday, hadn't he?

A. If he said he had, he had. I don't know it, personally.

Q. When you said that you folks had had him out to look at the ladder on one other occasion, he had been out there on his own and examined the ladder?

A. He had been out there some time ago.

Q. Yes.

A. But as to any recent examination he may have made, I [594] wouldn't have any idea.

Q. Can you enlighten us at all of any idea that you have in mind as to who or how these claimed changes were made?

A. I wouldn't have the slightest idea who. I wouldn't have the slightest idea how. I can tell you how it could be done.

Q. You don't have any idea?

A. Not the slightest and, incidentally, I would like the ladder to show that that ladder has been in the possession of the Swiers or the Dependable Ladder, and these plaintiffs have never had it in their possession, isn't that correct?

Q. There has been no question about that, it has been in the possession of the Dependable Ladder Company since January, 1956.

(Testimony of Thomas K. Hudson.)

A. It could have been.

Q. Until it arrived at this courtroom, of course.

A. But either the defendants or the Dependable Ladder have had this, the plaintiffs have never had access to it except when you were present. [595]

* * * * *

ALICE LOVELAND

called and sworn as a witness on behalf of the plaintiffs in rebuttal, testified as follows:

Direct Examination

Q. (By Mr. Hudson): Will you state your name, please? A. Alice Loveland.

Q. And where do you reside?

A. Denver, Colorado.

Q. And what is your occupation?

A. I am an attorney.

Q. How long have you and I been associated together?

A. I hate to say it, but it is close to 25 years.

Q. Together with Mr. Button?

A. Together with Mr. Button.

Q. What arrangement do you have with me for compensating me for my time in this hearing?

A. You are to receive no compensation at all. We practice law in that manner, when one needs assistance we get in and pitch.

Q. What compensation are you going to receive out of this? A. Not a dime.

Q. You were in Yakima on March 15, 1957?

A. Yes, I was.

(Testimony of Alice Loveland.)

Q. You heard my testimony?

A. Yes, I did.

Q. Can you tell me where you were and what you did about noontime on the morning of March 15, 1957?

A. Yes, I, in the company of George Mullins, Mr. and Mrs. Wong and myself, in one car, and yourself and Mr. Splawn, in another car, drove down to the Dependable Ladder Company in Yakima, and at the Dependable Ladder Company a man by the name of Rossow, who I understood was foreman of the plant, got out the ladder at the request of Mr. Splawn, that being the ladder which is here in the courtroom at this time. At that time an inspection was made of the ladder in the presence of all the persons I have named. Incidentally, I would like to add that there were, oh, a couple of other gentlemen around the plant that were walking back and forth, but they did not participate in this at all.

You borrowed a steel rule from the foreman there at Dependable Ladder Company and the ladder was placed down across, I don't know whether it was a keg or a sawhorse, as I recall, so that the tongue part was up, but the ladder was lying horizontal and at that time you made a measurement of the play in the tongue and very carefully inspected the top assembly, and I also [597] made an inspection of the top assembly. You measured it, I did not.

(Testimony of Alice Loveland.)

Q. Everyone that you have named was grouped around this ladder? A. Yes, we were.

Q. Did I, at that time, ask Mr. Rossow anything about the safety of the ladder, if you recall?

A. I don't recall that any question was propounded to him concerning the safety, or even the word "safety" mentioned or used.

Q. Now, not from the testimony that I have given here, but from your own recollection at the time this inspection was made that you are referring to, do you recall any measurements that I gave at that time?

A. Yes, I recall the measurement in the play of the tongue and that the measurement on the play of the tongue to the left, as I recall, was approximately four inches, and to the right about nine inches, and when I say those directions, it will be as I faced the top of the ladder.

Q. Do you recall anything about that top hinge assembly?

A. Yes, I do. I was standing there and saw you measure the top hinge assembly and saw the measurement and at that time you put your thumb-nail down on the steel tape at the three-sixteenths mark and made the statement, [598] "There is three-sixteenths inches of play in this particular assembly."

Q. Now, have you looked at this ladder since it has been in the courtroom?

A. I looked at it yesterday.

(Testimony of Alice Loveland.)

Q. I wonder if you would step down and look at it now?

A. (Witness leaves the stand to inspect the ladder, and returns.)

Q. Is there any change in condition from that which you described as being the condition down at the Dependable Ladder Company plant?

A. Yes, there is.

Q. And what is that change?

A. On the left-hand side of the top assembly and, again, as I would face the top part of the ladder, there are two washers on the inside where the bolt comes through. Those two washers were not on there when I saw it in March of '57, and on the other side there is one washer on the inside, and that one washer was not there when I examined it in March of '57.

Q. Is there now any play in the hinge assembly?

A. I don't know. (Witness examines.) Well, if there is any play there, I certainly can't find it now.

Q. The fact of the matter is, Miss Loveland, those bolts in the top of the hinge assembly could be turned by a [599] finger, couldn't they?

A. Yes, at that time those bolts were very loose and just touching them could move them. At this time, or let me say when I checked them yesterday, those bolts are tight, I mean very tight, you can't even begin to budge them.

Q. Have you done anything with that tongue down there?

(Testimony of Alice Loveland.)

A. I swung it back and forth yesterday.

Q. What condition do you find that in?

A. It's much tighter than it was, and oh, without taking a ruler to measure it, my estimate would be that it swings possibly half as far in each direction as it did in March of '57.

Mr. Hudson: You may examine.

Cross Examination

Q. (By Mr. Splawn): Miss Loveland, on this March 15, 1957, occasion to which you have referred, did you make any note or notes on paper of those measurements, such as a lawyer would do, at that time of coming from Denver to see the ladder the first time?

A. I made no measurements on paper.

Q. You made no notes? A. No. [600]

Q. Of what your examination was?

A. No, I didn't write it down.

Q. Has it been customary in your handling of lawsuits and in the preparation and investigation of cases which you are to try, that you make notes of what your investigation reveals?

A. Not necessarily, it depends upon the items, and it also depends upon whether or not I know enough about it to remember.

Q. At that time did you not think that was important enough to write down and make a note of it for your file?

A. I most certainly thought it was important and I most certainly remember it.

(Testimony of Alice Loveland.)

The Court: Will counsel step up to the bench a moment?

(Whereupon, counsel approached the bench.)

The Court: I am inclined to think that you are not doing it consciously, Mr. Splawn, but you are mugging this jury, and when Mr. Hudson was testifying and Miss Loveland was testifying you had a sneer on your face and you were looking right square at the jury.

Mr. Splawn: I am sorry.

The Court: If you don't quit that I am going to call it to the attention of the jury and instruct them to [601] disregard it. Now, quit it.

(Whereupon, the proceedings were resumed in open court within the hearing and presence of the jury.)

The Court: Well, I assume, Miss Loveland, that you made no memorandum of those measurements for your file for future reference in the trial of the case? A. I made no memorandum.

Q. (By Mr. Splawn): Now, did you, yourself, do any measurements?

A. I did not hold the rule, no.

Q. And did you, yourself, handle those bolts or nuts? A. When?

Q. Oh, on this occasion to which I am referring. A. You mean in March of '57?

Q. Yes.

A. We touched the tips of the bolts, yes.

Q. Well, did you actually turn them or do anything with them?

(Testimony of Alice Loveland.)

A. We took a hold of the nuts on the outside of the bolt and they were loose.

Q. And what did you do with them when you took a hold of them?

A. Left them right there.

Q. I see. Now, as I understand, you inspected this ladder last night, didn't you? [602]

A. No, I didn't inspect it on Friday. I was present but I didn't inspect the ladder.

Q. I see. This last Monday, the opening day of trial, did you inspect the ladder?

A. No, I didn't.

Q. Did you have your witness, Mr. McDonald, inspect it?

A. I don't believe he did at my request; he may have at Mr. Hudson's.

Q. He did inspect it, however, did he not, last Monday?

A. I don't know whether he did or did not, sir. I spoke to Mr. McDonald when he came in and that is my extent of any conversation with him.

* * * * *

GEORGE MULLINS

called and sworn as a witness on behalf of the plaintiffs in rebuttal, testified as follows: [603]

Direct Examination

Q. (By Mr. Hudson): Would you state your name, please? A. George H. Mullins.

Q. And where do you reside?

A. I reside in Yakima.

(Testimony of George Mullins.)

Q. And what is your occupation?

A. I am an attorney at law.

Q. And your offices are here in Yakima?

A. My offices are in the Miller Building in Yakima.

Q. Do you recall what you did late in the morning of March 15, 1957?

A. Yes, I accompanied you and Miss Loveland to the Dependable Ladder Company to inspect this ladder which is an exhibit in this case.

Q. Who else was there at the time of the inspection, Mr. Mullins?

A. Mrs. Wong and Mr. Wong, and also Mr. Rossow, I think his name is, who previously testified here.

Q. Was Mr. Splawn there?

A. Yes, Mr. Splawn was there.

Q. Do you recall what was done at the time of the inspection? A. Well, yes I do.

Q. Will you state what was done, to the best of your [604] recollection?

A. We took the ladder down and laid it on a bench and manipulated the ladder to see what play there was in the tongue, and also manipulated the yoke or hinge, as it has been referred to, and took measurements of the swing of the tongue, took measurements of the play in the bolts of the hinge, and also measurements of lateral movement in the hinge itself.

Q. Now, do you recall what those measurements were?

(Testimony of George Mullins.)

A. My recollection of the measurements is that they were made by you using a tape which you borrowed from Mr. Rossow and you yourself made the measurements and related them to me and I watched you make the measurements and they were about three-sixteenths of an inch of lateral play, and also about that much or maybe a little more moving the yoke back and forth. "Back and forth" is not very descriptive, but moving the tongue and yoke which is on the back of the ladder, away from the steps and back to the steps.

Q. Now, do you recall any measurement of the tongue?

A. It seems to me, and my recollection is that the tongue of the ladder, in ordinary movement, moved about four inches in each direction. I don't recall your exact measurements, but when it was adjusted by taking up the slack in the bolts at the top in the hinge or yoke, [605] that it moved about maybe eight or nine inches in one direction, and maybe three or four in the other.

Q. Now, have you inspected that ladder since then? A. Yes, I have.

Q. You saw it here in the courtroom yesterday?

A. Yes, I did.

Q. Is that ladder now in the condition it was when you saw it on March 15, 1957?

A. My impression is that it is not.

Q. Would you, if you can, state in what way it is not in the same condition?

A. Well, in particular, the thing I noticed

(Testimony of George Mullins.)

which I feel is not the same as it was at that time, is the lateral play of the yoke between the two side plates of the ladder, and the difference between the metal on the hinge there at the top, and the metal side plates at the top of the ladder.

Q. There is no play there now, is that right?

A. There was not when I looked at it yesterday.

Q. Would you look at it now, please?

A. (Witness examines ladder.)

Q. Is there any play there now?

A. There is no, what I refer to as lateral play, at the present time.

Q. Did you observe how much play there is in the tongue [606] as of now?

A. (Witness examines ladder.)

Q. Is that condition changed from when you saw it in March, '57?

A. I believe that there is a little less play in the tongue now than at that time. In testing that ladder just now I swung the tongue back and forth without at first sliding it up in the play in the bolts up there, and there was about, well, maybe about four inches on one side and a couple or three on the other, and then in lifting up the tongue to get the advantage of the what appears to be wear in the bolt holes, it appeared to swing, in my judgment, about maybe seven inches to the left side of the ladder, if you were looking at it from standing up.

Mr. Hudson: You may inquire.

(Testimony of George Mullins.)

Cross Examination

Q. (By Mr. Splawn): George, do you remember on that occasion when you were out there someone taking this tongue and violently working it back and forth to see the possible condition of it (counsel Splawn shakes ladder).

The Court: I don't think you should do that again, Mr. Splawn, we might loosen the bolts at the top, and we [607] want the jury to have the ladder in its present condition.

Mr. Splawn: I didn't have that in mind at all, your Honor.

The Court: I didn't say you had it in mind, I said in looking at the ladder it could very well have that effect. All right, go ahead.

Mr. Splawn: I am sorry.

Q. You may answer.

A. Yes, it was moved back and forth. I don't recall, however, Mr. Splawn, that it was moved quite in that manner.

Q. Well, wasn't it moved to find out the maximum amount of play in that tongue, George?

A. Yes, it was.

Q. Yes, and incidentally, did you make any notes for any file of yours about any measurements?

A. No, I don't have them in any file of mine, and if I made any notes they were probably on the back of an envelope which I don't have any longer, or on a small piece of paper which I must have discarded. I looked, Mr. Splawn, for any notes which I might have on those measurements, and I don't find them.

(Testimony of George Mullins.)

Q. You were associated in the case representing the plaintiff at that time? A. Yes, I was.

Q. Did you, yourself, consider it important to record in some manner the measurements?

A. Yes, I did.

Q. But you didn't do that?

A. I didn't do it myself.

Q. Do you remember Monday when your witness, Mr. McDonald, of the Department of Labor, was here testifying? A. Yes, I do.

Q. And he examined the ladder, did he not?

A. Yes.

Q. George, you had him out there at the Dependable Ladder Company at least once, have you not, to examine the ladder? A. Yes.

Q. I see.

A. I think he has been out there twice.

Q. He has been out there twice, in fact, and that has been over a period of what time?

A. Well, let's see; well, since March 15 of 1957.

Q. George, do you remember your associate, Mr. Hudson, inquiring of Mr. Rossow as to the ladder?

A. Yes, I do.

Q. And do you remember your associate, Mr. Hudson, asking Mr. Rossow whether he thought the ladder was unsafe because of anything that Mr. Hudson had found out about [609] the ladder?

A. I don't recall that question.

Q. You don't remember that? Do you remember there was some conference between them?

A. Where, Mr. Splawn?

(Testimony of George Mullins.)

Q. On this March 15, 1957, occasion?

A. Oh, yes, I remember them at that time talking about the condition of the ladder.

Q. Don't you remember Mr. Hudson asking Mr. Rossow about the safety of the ladder and what Mr. Rossow told him?

A. Yes, I remember Mr. Hudson asking that question and Mr. Rossow giving his opinion on it.

Q. And his opinion was that the ladder was perfectly safe, do you remember that, George?

A. That is what his statement was.

Q. That is what his statement was, and that was on that very occasion, wasn't it?

A. Yes, I am sure it was.

Q. George, I assume that you are not donating your time? A. Well, I hope not. [610]

* * * * *

FRANK LYEN

called and sworn as an interpreter to interpret the testimony of the witness Kent Wong, from the Chinese language into the English language as follows:

KENT WONG

the plaintiff, called and sworn as a witness in his own behalf in rebuttal, testified as follows:

Direct Examination

Q. (By Mr. Hudson): Will you state your name, please?

The Court: Mr. Interpreter, when the questions are asked, you just repeat them, a literal, exact

(Testimony of Kent Wong.)

translation in Cantonese Chinese for the witness, and then interpret his answers when he gives them.

A. Kent Wong.

Q. (By Mr. Hudson): Where do you reside?

A. At Portland, Oregon.

Q. Where did you reside in October of 1955?

A. Cowiche, Washington, and he lives with a fellow by the name of Walter Swier.

Q. On October 17, 1955, were you in the employ of Mr. Swier? A. Yes.

Q. What was he doing?

A. He was picking apples.

Q. Were there any other members of his family picking apples? A. Yes.

Q. Who were they?

A. His wife, son and daughter.

Q. Which daughter? A. Marjory Ann.

Q. Did any member of the family have an accident that morning?

A. He said his wife fell off the ladder that morning.

Q. Did you see the accident? A. No.

Q. Were you picking on the same tree that Mrs. Wong was picking on?

A. No, he was on the second row.

Q. That is on the second row? How soon after Mrs. Wong's fall did you get to where she was?

A. He said he heard the wife call, I mean, the daughter call him, call his attention. She was going to Walter [612] Swier's home and tell Walter Swier that somebody fell off the tree.

(Testimony of Kent Wong.)

Q. And when his daughter called him did he immediately go to his wife?

A. Yes, he went immediately.

Q. Now, at the time he got to where his wife was lying, who was there?

A. Nobody else was staying but him.

Q. What position was his wife in when he arrived?

A. She was on her back, rolling.

Mr. Splawn: I didn't hear that, I am sorry.

A. She was rolling on her back.

Q. (By Mr. Hudson): Where was the ladder at that time? A. The ladder was on the ground.

Q. Pardon me?

A. The ladder was on the ground.

Q. On the ground? Were there any apple boxes around at that time?

A. Yes, there was apple boxes there that were already filled with apples.

Q. How many, if you recall?

A. He recollects there was about six or seven boxes.

Q. Were the apple boxes stacked there?

A. Yes, they were stacked.

Q. How high were they stacked? [613]

A. Three boxes in one stack.

Q. Where were these apple boxes in relationship to the ladder?

A. Well, according to him he could see the trees in front of him and stacked with, the stack of apple boxes was on the right of the tree and the ladder

(Testimony of Kent Wong.)

and his wife was on the left of the tree. The ladder was also lying on the ground.

Q. You say the ladder had fallen to the left?

A. The left of the tree, according to his position.

Q. Were the boxes of apples that were stacked three high disturbed in any way?

A. What do you mean? The ladder?

Q. If the boxes were stacked three high.

A. To push against them, you mean?

Q. Now, were they disturbed in any way, kicked around?

A. No, the apples were still stacked three high in the same position.

Q. Now, did anyone else arrive at the scene of the accident?

A. His son came after he arrived at the scene of the accident.

Q. And did anyone else get there at that time?

A. Nobody else.

Q. At that time what did you do?

A. He went immediately to Walter Swier to report it and his [614] son to follow up to the scene of the accident. Apparently the daughter never got to the house yet, he went right away.

Q. He went to the house? A. That is right.

Q. Then, did you return after going to the Swier house, to the scene of the accident?

A. Before he got to the house Mr. Walter's wife came out and started calling for her husband;

(Testimony of Kent Wong.)

called, "Walter," called, "Walter," called, "Walter."

Q. Did Mr. Wong, after he went to the Swier house, did he return to the scene of the accident?

A. Yes, he went back with Mr. Walter, back to the scene of the accident, and Mrs. Walter was on the way to the accident; half of the way she tripped and he helped her up.

Q. Now, at the time Mr. Wong returned to the scene of the accident, where was the ladder?

A. It was already set up by the time he got there, somebody set it up.

Q. Where had it been set up?

A. On the next tree.

Q. At the next tree?

A. Where the tree wasn't picked yet.

Q. A tree, you say, that had not been picked?

A. Had not been picked.

Q. Mr. Wong, did you go to the Dependable Ladder Company in Yakima on March 15, 1957?

A. Yes.

Q. Who was there at the time?

A. When he went to that company there was that table full of you and Mr. Mullins and also whoever was the manager, whoever was operating that ladder company.

Q. Everyone at this table was there?

A. Yes, and Mr. Mullins.

Q. Mr. Splawn? A. Yes.

Q. Was there an inspection of the ladder made at that time which is now an exhibit here?

(Testimony of Kent Wong.)

A. Yes, they did.

Q. Did he inspect it at that time?

A. He didn't know anything about it, he just looked at it but he didn't know anything about inspection of it.

Q. Were there any measurements taken?

A. Yes, apparently one of you on the table did measure that ladder.

Q. Does he know who took the measurements?

A. Yes, it's you, but I don't know your name.

Q. I see. Does he recall where the measurements were taken, that is, where on the ladder?

A. He saw you wiggling the bottom of the ladder to see how much leverage there was.

Q. Was there anything at the top of the ladder?

A. Yes, he was jangling the top of the ladder.

Mr. Hudson: You may inquire.

Cross Examination

Q. (By Mr. Splawn): Do you know David Swier? A. Yes.

Q. Was he picking apples in the orchard on the day of the accident? A. Yes.

Q. Do you remember how close he was picking apples to the tree where your wife had her accident? A. He don't recollect.

Q. Did you see him at the place where the accident happened?

A. After the accident happened?

Q. Immediately after the accident did you see David Swier there where the accident happened?

(Testimony of Kent Wong.)

A. After he reported the accident he saw him. After he reported the accident to Mr. Swier, then he came back, then he saw him?

Q. Was that when you returned from the house?

A. Yes. [617]

Q. When you returned from the house you saw David Swier where your wife was lying on the ground?

A. There was three persons, apparently, there when he arrived, including his son.

Q. Including his son? A. Yes.

Q. When you mentioned his son, did you mean David Swier?

A. No, his son followed him.

Q. Was David Swier at the place where your wife was when you returned from the house?

A. Yes, he was there when he returned from the house.

Q. When you left to go to the house did you see David Swier coming over to where your wife was?

A. Come again.

Q. When you left to go to the house, did you see David Swier coming over to where your wife was?

A. No, quite a distance, he didn't even see her.

Q. Who else was at the place where your wife was when you got back from the house, besides David Swier?

A. When he came back there was already two persons working on the wife's leg, putting splints on it.

(Testimony of Kent Wong.)

Q. Was one of those persons David Swier?

A. Yes.

Q. Is it not a fact that you did not go to the house until after Mrs. Swier had come out and sent you to the house? [618]

A. No, they met just about a few yards from the house, Mrs. Swier's house, then both went to the scene of the accident. She called, "Walter, Walter." She was calling for Walter, and Walter came. He met her a few yards from the doorstep.

* * * * *

ROSE WONG

the plaintiff, recalled as a witness in her own behalf in rebuttal, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. Hudson): You recall, of course, the accident you had on October 17, 1955, which you have already testified about? A. Yes.

Q. Who was the first person to reach you after your fall?

A. Marjory, my daughter, had been picking on the tree and she saw it. She didn't touch me, she saw it and went on. [619]

Q. And then who next? A. My husband.

Q. And who next? A. Richard.

Q. And who next?

A. Dave Swier and Mr. Dart.

Q. Now, did anyone go to anywhere to get assistance? A. Yes, sir.

(Testimony of Rose Wong.)

Q. Who were they? A. My husband.

Q. Now, what was Mr. Dart doing for you?

A. He was taking my picking bag off.

Q. You were lying on the ground?

A. Yes. Of course, they buckle back of the shoulders so there was movement in the upper part of my body, but I was on the ground.

Q. You had removed the picking bag?

A. Yes, sir.

Q. Now, if you know, immediately following your fall, where was this ladder?

A. It was on the ground.

Q. Now, were there some apple boxes there?

A. There was apple boxes to the right of the tree. If the tree was here (indicating) and I were facing it, I was picking facing it, then the boxes were to my right. [620]

Q. How close were those boxes to the side of your ladder?

A. The apple boxes were placed along the rough road they use to pick the apples up. There is a wagon and a truck or a tractor, and they drove that tractor and wagon behind it to pick the apples up. The apple boxes are to be placed, and were placed that day, along that road. My ladder, when I was picking, was just about halfway around the tree, so the boxes lay quite, oh, I can't measure distances too well, but, well, the apple boxes would have been much farther than the length of that ladder away, about like that (indicating).

(Testimony of Kent Wong.)

Q. Now, do you know how many boxes there were there, apple boxes?

A. Well, I know there were several, yes, sir.

Q. Do you know how they were stacked?

A. Yes, they were stacked one on top of the other, to conserve space.

Q. And how high were they stacked?

A. There were some that were three high, yes, sir.

Q. Now, when the ladder was on the ground where was it in location to the boxes?

A. The boxes were to my right, the ladder had fallen to my left; I was this way, between (indicating).

Q. Now, you said that Mr. Dart was assisting you to remove your picking bag? [621]

A. Yes, sir.

Q. What at that particular time did Mr. David Swier do? A. He picked the ladder up.

Q. What did he do with it?

A. He placed it aside.

Q. Do you know where he placed it aside?

A. No, I couldn't see. He went to the back of my head and my eyes couldn't follow.

Q. He removed it from your proximity?

A. Yes, sir.

Q. Now, do you recall, Mrs. Wong, going to the Dependable Ladder Company on March 15, 1957?

A. Yes, sir.

Q. Would you tell me who was there?

A. Yes, I can.

(Testimony of Rose Wong.)

Q. Who was?

A. Myself, my husband, Mr. Kent Wong, Mr. Hudson, Miss Loveland, Mr. Mullins, Mr. Splawn, the attendant at Dependable Ladder Company, and over to one side there was one or two workmen; I don't know how many, but one or two.

Q. Do you recall what was done there?

A. Yes, I do.

Q. Will you tell me what was done?

A. The ladder was brought out and Mr. Hudson, Miss Loveland, [622] Mr. Mullins, myself, Mr. Wong, and the attendant all gathered around.

Q. Was Mr. Splawn there?

A. Mr. Splawn was there. We all gathered around and you asked for a tape measure. I didn't have it in my hands but I saw that you received one from the attendant and forthwith you measured the ladder both at the bottom, moving the tongue, and at the top.

Q. Did you, personally, observe the condition of the ladder at that time, Mrs. Wong?

A. I saw it.

Q. Did you overhear or did I state so that you did hear any measurements that I may have made?

A. I know that you had placed your finger on the tape measure. I cannot tell you how much you said, but you showed it to Miss Loveland and Mr. Mullins, but you did not show it to me, personally.

Q. Now, have you inspected that ladder since it has been in the courtroom? A. No, sir.

(Testimony of Rose Wong.)

Q. I wonder if you would step down and look at that ladder, if you please?

A. (Witness leaves stand and examines ladder.)

Q. I wish you would observe that top assembly, if you would, please. [623]

A. Yes, sir.

Q. I wish you would state if that top assembly, as you see it now, is in the same condition as when you saw it on March 15, of 1957.

A. No, sir.

Q. In what respect is it different?

A. The bolts, the burrs, have been tightened up on the end of the bolt.

Q. Well, at least, you mean the slack has been taken out between the yoke and the side plate?

A. That is right.

Q. Or the side of the hinge and the side plate?

A. Yes.

Q. Can you conveniently move that tongue, don't do something that is going to cause you to fall.

A. (Witness moves portion of ladder.)

Q. Is the play in the tongue the same amount as the play in the tongue when you saw it in the Dependable Ladder Company on March 15, '57?

A. No, sir.

Q. Is there more or less? A. There is less.

Mr. Hudson: Just resume your seat, please. You may inquire. [624]

Cross Examination

Q. (By Mr. Splawn): I assume that on that occasion you were depending upon your counsel

(Testimony of Rose Wong.)

to make the inspection of the ladder, or did you actively participate in manipulating the ladder yourself? A. I saw him move it.

Q. Yes, you did not undertake to manipulate the ladder yourself, did you?

A. No, sir, I didn't.

Q. At that time did you make any close inspection of the ladder as to detail?

A. I stood very close or where I watched them do it, yes, sir, and I was very close to the top of the ladder where I could get a good view of it, yes, sir. I remember even pointing to the fact that it was loose, yes, sir.

Q. Do you find anything at the top assembly as it is now other than the tightening of the burrs, as you refer to it, that is different from what it was as you observed it?

A. I don't believe that I can tell you, I am not good at mechanical construction. I observed that it was loose.

Q. I see.

A. It's general assembly I know nothing about.

Q. On that occasion you remembered the ladder was the one which you had been using?

A. Yes, sir.

Q. And do you remember when using it it was that loose? A. Beg your pardon?

Q. Do you remember that the ladder, when you were using it to pick apples, was that loose, as you have described it?

(Testimony of Rose Wong.)

A. Had I observed a flaw in the ladder, I certainly would have told him, sir.

Q. Yes, you observed none?

A. Not to the minute inspection, no, sir. [626]

* * * * *

Q. In your use of the ladder, while you were using it did you observe any looseness?

A. I observed nothing that I felt would cause me to think that the ladder was, there was something wrong with it, no, I didn't.

Q. And as you set the ladder and used it to pick apples during the course of that apple picking season up to the date of the accident, there was nothing up there that caused the ladder to be such that you felt unsafe on it?

A. That ladder wasn't in continuous use with me.

Mr. Hudson: If your Honor please, she just can't answer those questions. She doesn't know. If she had a ladder, she took it, she is not a mechanic, she doesn't know whether there is a defect or not.

The Court: I think she said she didn't have that ladder in continuous use.

Mr. Splawn: May I make another question?

The Court: All right.

Q. (By Mr. Splawn): While you were using the ladder was [627] there any looseness of it that you observed at all?

A. I observed nothing to make me think that

(Testimony of Rose Wong.)

the ladder was not usable at that time, if it had been so, I would have told them.

Q. Well, during the time that you did use this ladder were you conscious of any looseness of the tongue or the top assembly?

A. I hadn't observed it closely.

Q. Well, were you aware of it?

A. I knew it as we did every ladder we used that way.

Q. Well, would you answer my question, please, Mrs. Wong. Were you aware while you were using the ladder of it being loose at all in the top assembly?

A. I was not aware of the looseness. [628]

* * * * *

ROBERT I. BOUNDS

recalled as a witness on behalf of the defendants in rebuttal, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. Splawn): Will you please state your name? A. Robert I. Bounds.

Q. And what is your profession?

A. Attorney at law.

Q. And with whom are you associated now?

A. With Mr. Splawn.

Q. Are you interested in this present lawsuit in any fashion?

A. Not financially; other than a bystander.

Q. Do you appear as an attorney of record in this case? A. I do not.

(Testimony of Robert I. Bounds.)

Q. When this case was commenced do you know whether or not you were then associated with me as a partner? A. I don't believe so.

Q. Bob, this last Monday morning what did you and I do with [629] respect to a ladder?

A. Well, you picked me up in your station wagon at my home at eight o'clock in the morning.

Q. This was last Monday morning?

A. This was last Monday morning.

Q. All right.

A. And we went to the Dependable Ladder Company.

Q. And who was there?

A. You, myself, Mr. Rossow, and there were some workmen in the shop whom I do not know.

Q. And when you got there, what took place?

A. We took the ladder out of the shop and put it in the station wagon.

Q. Incidentally, where the shop was, do you remember as to how the door was, whether it was locked or unlocked? A. The sliding door?

Q. Yes.

Mr. Hudson: If the Court please, I don't believe that makes any difference. At eight o'clock in the morning most places are unlocked.

The Court: I beg your pardon.

Mr. Hudson: The average manufacturing place is unlocked.

The Court: Well, he may answer.

A. It's my recollection that the door, the sliding door, [630] is a bolt latch, if my recollection is

(Testimony of Robert I. Bounds.)

correct, and that the bolt was in a locked position, that is my recollection.

Q. (By Mr. Splawn): Do you remember a padlock that someone had to open?

A. I frankly don't recall.

Q. I see. Well, then, what did we do?

A. Well, the ladder was inside the shop beyond the office, it was on the north wall up against the wall with the tongue facing out (indicating). We picked the ladder up and put it in the station wagon.

Q. In that position where the ladder was as you have just testified, the previous week on any day had you seen that ladder in the same position?

A. Yes, it was in the same position.

Q. And on what day was that?

A. I believe it was Wednesday. That was the day that Mr. Hudson and Miss or Mrs. Loveland were there.

Mr. Hudson: I will stipulate that that gentleman was down there with us on Friday. He was good enough to accompany us because Mr. Splawn was tied up. That was Friday of last week.

The Court: All right.

Q. (By Mr. Splawn): You were there on the occasion when Mr. Hudson and Miss Loveland were there looking at the [631] ladder?

A. Yes, that is correct.

Q. Were you there all the time with them while they were inspecting the ladder last Friday, if that is the date?

(Testimony of Robert I. Bounds.)

A. There was probably about a minute and a half when—the office of the Dependable Ladder Company is separated by a partition from the shop, a glass door—they were probably a minute and a half in there when I was still in the reception room but I could see them in the other room; I was with them there at all times.

Q. When we picked this ladder up Monday morning, as you have testified, was the ladder when you picked it up in the same place and position it was when it was left on the Friday occasion when you were there?

A. Yes, in the same position, the same place.

Q. Well, we put the ladder in what, then?

A. In the back of your station wagon.

Q. What else did we put in there?

A. We put in three boxes of dirt, a coil of baling wire and a box of apples and a picking bag.

Q. And where did we go?

A. We came directly to the courthouse here and parked on a side street in a meter zone.

Q. I see. Do you remember being present in my office on Friday afternoon late when Mr. Hudson and Miss Loveland [632] were in my office?

A. If the date was Friday, I recall the time.

Q. Mr. Hudson said it was a guess, there is no dispute about it, Bob, do you remember Mr. Hudson asking whether or not we would see to it that the ladder was brought to the courtroom?

The Court: That is a little leading.

(Testimony of Robert I. Bounds.)

Mr. Splawn: Well, I am sorry if it is, your Honor.

The Court: You can ask him. I don't think there is any question about that, is there?

Mr. Hudson: Oh, no, I will stipulate that I said to him, "Homer, be sure that ladder gets up to the courthouse Monday."

The Court: All right, let's move along with this, I think we are taking too much time.

Mr. Splawn: I am very sorry, I am trying to go as fast as I can.

Q. What did we do after we got it out to the car?

I don't want to lead, your Honor.

The Court: Well, ask him what you did. He is an attorney, he can tell you.

Mr. Splawn: I know, I am sorry I am holding things up.

A. We took the ladder out of the car, you carried the ladder up, I was on the end to watch that it didn't hit [633] anything as we were coming up the stairway, brought the ladder up and it was put into the corridor on the south end of this courtroom and we made several trips up bringing the rest of the baling wire and apple boxes and dirt, and nothing was done to the ladder. It was set and placed there.

Q. (By Mr. Splawn): Did we leave at the same time or not?

A. I think we did, my best recollection is we both went back at the same time. [634]

* * * * *

Mr. Hudson: Well, this is the only time that we can present a motion for a directed verdict, is it not?

The Court: Yes, I think that is correct.

Miss Loveland: May it please the Court, at this time on behalf of the plaintiff we wish to ask the Court for a peremptory instruction directing a verdict in favor of the plaintiff and against the defendants Swier in this case in accordance with the plaintiffs' contentions as set forth in the pre-trial order. This motion is founded upon a failure of any evidence upon which reasonable people [655] could differ or upon which any other inferences could be drawn other than inferences in favor of the plaintiff.

And, secondly, as a matter of law, on taking up the matter of law, we have to keep in mind, first, the admissions of the parties here and the elements which are necessary to be proven before plaintiff can recover.

We have an admitted fact that she was an employee of the defendant and an admitted fact that in the course of her employment and using a ladder furnished by Mr. Swier she sustained a fall and that an injury resulted. We also have the major admitted fact that it was the duty of the Swiers to furnish her a safe ladder. All of those things are admitted, so we have only two elements left which the plaintiff must establish before she is entitled to recover. One is, of course, the measure of her damage, and that measure of damages, there has been no evidence of any kind offered to contra-

dict or dispute that in any way. They have not even, no attempt was made, they have therefore accepted it, the damages, as the plaintiff and her witnesses have testified to them.

Then, we come to the very important and crucial thing here, and that is the ladder itself and the safety of that ladder. It is our position here that as a matter of law we are entitled to this directed verdict because the defendant's own evidence brings forth two legal [656] propositions, both of which resolves in the plaintiff's favor. The first one is an admission on their part. I would like to say that there is no exception from any of the decisions of the State or Federal Courts that I was able to find in instances where a party either directly or indirectly, by fraud, by fabrication of evidence, by tampering with evidence, by altering the evidence, there is not one single case which doesn't follow and state the rule that is laid down, the well-settled rule that all efforts by either party to a suit directly or indirectly to destroy, fabricate or suppress evidence is in the nature of an admission that the party has no sufficient case unless aided by suppressing evidence or by the fabrication of more evidence. That particular citation was from *Silver vs. Northern California Power Company*—162 Pac. 412. The very same rule is stated in a Circuit Court of Appeals case in the 9th Circuit, it is *Silverbaum vs. U. S.* arising in the 9th Circuit, appearing in 94 Fed. (2d) at page 74, and this particular language appearing at page 762. That case, just informational-wise, concerned the

alteration of logs on a ship, and at the time of trial the matter of alteration was presented by way of evidence, and this is the language of the court, which becomes very important to show that it is not only an admission but also raises a presumption, but here it is: [657]

“Once you find there has been tampering with the log, as the court has said on many occasions, the court looks with suspicion at the whole matter and without exception each case holds that such conduct was with the consciousness of guilt an admission that the original was defective and was adverse to their interests.”

We have first, then, by reason of law, and their witnesses, their own witnesses, an admission then by operation of law that they have no defense here unless something was done to the evidence. Then, once this evidence comes in showing an alteration, a fabrication, then we have a legal presumption arising, a legal presumption which the defendant then must offer evidence to overthrow or rebut, otherwise that presumption stands as a matter of law.

I would like to again read from the Silver case vs. the Northern California Power Company. Incidentally, that was a case which involved some defective electric wire, and at the time of trial the wires were brought in as evidence and there was testimony to the effect that those were not the wires which were actually involved in the fire or the burning, and this is what the court said:

“The fabrication of evidence is calculated to raise a presumption against the party who has recourse

to such practice not less than when evidence has been suppressed or withheld.” [658]

Going to the Ninth Circuit case, which also sets forth the presumption, and it uses this language:

“The importance of a log in determining marine causes has always been recognized in courts of admiralty. The alteration of log books by alteration and substitution has long been condemned. It not only casts suspicion on the whole case of the plaintiff but creates a strong presumption that the erased matter was adverse to their own testimony.”

We now have by their own testimony a presumption that the plaintiff has changed the evidence in this case. We have Wigmore on “Evidence”, page 120, at Sec. 278, the following language:

“It has always been understood, the inference, indeed, is one of the simplest in human experience, that a party’s falsehood or other fraud in the presentation of his cause, the fabrication in the presentation of evidence by bribery or spoliation——”

and certainly we have that here in the testimony concerning alterations:

“——and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one and from that consciousness may be inferred the fact itself of the cause’s lack of truth and merit. The inference, thus, does not apply itself necessarily to any specific effect in the case but operates [659] indefinitely and strongly against the whole mass of alleged facts constituting his case.”

The testimony of the alteration, the testimony that by their witnesses, that the ladder at this trial is not in the same condition as it was when these people first saw it, does not affect just that alone, it goes to every fact, everything in these defendants' whole case.

There are numerous Federal cases in which the very same rule has been repeated and repeated over and over again, setting forth those two elements that, first, it is an admission on that party's part that he has no case or he has no defense; secondly, once that testimony is in, and keeping in mind the defendants' own testimony, then we have a presumption which no evidence here has been offered in any way to rebut or overthrow.

We have *Harvey vs. the United States*—215 Fed. (2d) 330. *U. S. vs. Kelly*—219 Fed. Sup. 217. *Wilson vs. U. S.*—162 U. S. 13. *U. S. vs. Warren*—160 Fed. (2) 438. In each of them they say that the fabrication of any evidence to establish a case or to establish evidence, if it is criminal, is cogent evidence either that they have no defense, they have no case, or if it is criminal, it's evidence of guilt.

So, here we have those two things on which no [660] evidence or testimony of any kind has been offered. We have by operation of law an admission that they had no case unless there was some change in the evidence, and too, a presumption right there that they had none, and once that presumption comes into being, and it is by the decision of the Circuit Court, then they must rebut or over-

throw that by stating the next step in going forward, which hasn't been done.

We feel that under these circumstances that the Court should give a peremptory instruction directing a verdict in favor of the plaintiff in the case.

The Court: I think the motion should be denied at this time. I think it makes quite a difference whether the case is one before the court, as the admiralty cases must be, or before a court with a jury, and it depends upon the jurisdiction to a considerable extent. [661]

* * * * *

Court's Instructions to the Jury

The Court: Now, Gentlemen of the Jury, before I proceed with these formal instructions, I think I should give you a word of explanation if not of apology for their length and perhaps, complexity. I know it's particularly difficult in Federal Court when you don't get a typed copy of the Court's instructions, as you do in State Court. It isn't the practice here, they are given to you orally and read to you, and then you have to remember them as best you can, and I know that puts a very heavy burden upon human memory, but in a case of this kind presents a good many questions of law. It's my duty to instruct you concerning them fully and accurately, as accurately as I can.

And another thing that perhaps jurors do not appreciate, and that is, as you have been told and will be [663] told again by formal instructions, the jurors are the sole and exclusive judges of the facts. Now, where there is conflicting testimony and con-

flicting evidence, I have no means of knowing how you are going to resolve that conflict and for which side you will finally find, so far as the facts are concerned. So that it is my duty to give you the theories of both sides so far as the law is concerned, and I must instruct you, on the one hand, what would be the result if you find for the defendants' version in certain particulars or, on the other hand, what would be the result if you find for the plaintiffs. That is the reason that I am obliged to give some of these instructions that might, at first blush, seem to be inconsistent. I don't think that they are if they are viewed in that light.

Now, before I start out, too, I think I should say that while I am not trying to detract from my formal opinions or from my formal instructions which it is your duty to follow as best you can, I think it might help you and I would say aid you, so far as the question of liability is concerned, aside from the question of damages, that this case is neither so complex, in my judgment, and so complicated as the volume of evidence and the length of time that was spent here would indicate. Basically, your problem here is to find from this evidence whether Mr. and Mrs. Swier, the defendants, furnished a reasonably safe [664] ladder to Mrs. Wong to pick these apples. If they didn't furnish a reasonably safe ladder and as a direct result of it Mrs. Wong fell with the ladder or it fell with her and she was injured, then the defendants are liable to her in whatever you find to be the reasonable and proper damages for the injuries, assuming

that the defenses here of assumption of risk and contributory negligence have not been established as I will define those to you in the course of these instructions.

If, of course, either of the defenses has been established, then you should find for the defendants.

Now, it is my duty to instruct you as to the law of the case and it is your duty to follow my instructions. A Judge of a Federal Court has the right, if he chooses to exercise it, to comment on the evidence, but I am not going to try to invade your functions, and I will not consciously make any extended comments on the evidence. If I should do so, however, I want you to remember that while it is your duty to follow my instructions as to the law, you may consider, but you are not obliged to follow, any comments that I may make as to the facts of the case or what the facts indicate or show on that point. On that point you are the sole judges.

Your verdict should be based only upon these instructions and upon the evidence admitted in this case. [665] You should not consider the financial ability of the one or the necessities of the other; neither should sympathy or prejudice have any place in your deliberations, for all parties are equal before the law and all are entitled to exact justice.

The order in which the instructions are given has no significance as to their relative importance, and you should not single out any particular in-

struction and place undue emphasis upon such instruction, but should consider the instructions as a whole.

Now, the jury, as I said before, has the sole responsibility and duty to decide questions of fact from the evidence, and the judge has the sole responsibility and duty to decide questions of law.

As I have heretofore informed you, I have dismissed from this case the defendants Dr. James E. Zimmerman and the Yakima Valley Memorial Hospital Association, for the reason that I concluded from the evidence submitted that only questions of law were involved as to them, and I decided those questions in their favor. There remains for your consideration, then, only the issues as between the plaintiffs Rose Wong and Kent Wong, and the defendants Walter Swier and Laura Swier, his wife. For convenience in giving you these instructions I shall refer to defendants Walter Swier and Laura Swier as if they were the only [666] defendants in the case, since they are the only remaining defendants herein, and when I say "defendants," therefore, I mean defendants Swier and wife. Also, hereafter, as a matter of convenience, I shall refer to Rose Wong as if she were the only plaintiff. You are to decide the issues just as if the Swiers had been the only defendants from the outset of the trial. You are not to draw any inference whatsoever, either in favor of or against the Swiers because I have dismissed Dr. Zimmerman and the hospital from the case.

The pre-trial order which is approved by the at-

torneys for the parties and signed by the judge of the court prior to the commencement of the trial, sets out the admitted facts, the contentions of the parties and a statement of the issues of fact which it is your duty to decide. The admitted facts which I shall recite to you, are to be taken by you as established, as it is not necessary to produce any testimony or evidence to prove an admitted fact.

Admitted facts in the present case are as follows:

Plaintiff, Rose Wong, was on October 17, 1955, in the employ of the defendants Walter Swier and Laura Swier, and as such employee she used a ladder furnished by the defendants. The defendants were under a duty to furnish [667] plaintiff a safe ladder. Plaintiff sustained injuries by reason of a fall from the ladder in the course of her employment.

The contentions of the parties are only what they claim and hope to prove. They are not evidence and should not be considered as such.

The contentions of the plaintiff are as follows:

The ladder furnished to plaintiff Rose Wong by the defendants Swier, was unsafe, defective and dangerous, of which fact plaintiff was ignorant. Defendants knew the defective and dangerous condition of the ladder but failed to warn the plaintiff of its condition. The defective and unsafe condition of the ladder included, but was not limited to: (a) The metal plate and bolt assembly at the top of the ladder was defective and (b) The tongue of the ladder was defective. The plaintiff's fall was proximately caused by the defective condition

of the ladder, and by reason thereof she sustained a compound, comminuted fracture of the left ankle which involved the distal end of the shaft of the tibia and fibula, and was otherwise injured. As a proximate result of the negligence of the defendants, plaintiff has sustained permanent injuries and disabilities, consisting of a shortening of the left leg, permanent and severe scarring, permanent and continual pain, and will be prevented from carrying on [668] any occupation and from caring for her family, and has suffered and will continue to suffer great pain of body and mind. Plaintiff claims special damages in the amount of \$3392.57 and general damages in the sum of \$97,600, and contends that she will continue to incur expenses for medical attention, hospitalization, drugs and orthopedic appliances.

The contentions of the defendants are as follows:

Plaintiff assumed whatever risks were entailed in the condition of the ladder or the use made or expected of it. Plaintiff, in the use of the ladder, was negligent in that she endeavored to use it while she was in an unbalanced position, endeavoring to pick fruit at an angle and at a distance from the ladder, so as to cause her and the ladder to become unbalanced and fall; or, that because of the way in which she fell and the ladder fell, she did not set it properly in the first instance; or, in the use of the picking bag, she positioned it so that it obstructed or impaired the use of the ladder, and put her in an unbalanced position with respect to the ladder; or she was not attentive to

the fact that she was in an unbalanced position; or was not paying sufficient attention to the fact that in the use of the ladder she could not extend her body to the degree and angle which she must have done; or, she permitted herself to slip on the rung of the ladder [669] on which she was standing so that she did not have a firm footing.

The issues of fact which it is the duty of the jury to decide in this case are as follows:

(1) Was the ladder furnished by the defendants so defective and unsafe in the respects claimed by the plaintiff that it was not a safe ladder for the use for which it was intended and furnished?

(2) Did the plaintiff, Rose Wong, assume the risk of the defective and unsafe condition of the ladder, if any, and the risk of using the ladder in its actual condition?

(3) Was the plaintiff negligent in the use of the ladder in the respects contended by the defendants?

(4) If plaintiff sustained injury as a proximate result of the negligence of the defendants, what is the extent and character thereof, and in what amount should she be compensated therefor?

The plaintiff has the burden of proving by a fair preponderance of the evidence the contentions as above stated, that the defendants were negligent in furnishing her a defective and unsafe ladder for her use in picking apples; and the defendants have the burden of proving by a fair preponderance of the evidence their contentions that the plaintiff assumed the risk of using the ladder,

and [670] that there was contributory negligence on her part—that is to say, that her own negligence proximately and substantially contributed to cause her fall and resulting injury.

The term “proximate cause” means that cause which in a direct, unbroken sequence produces the injury complained of and without which such injury would not have happened.

The term “fair preponderance of the evidence” means the greater weight of credible evidence in the case. It does not necessarily mean the evidence of the greater number of witnesses, but means that evidence which carries the greater convincing power to your minds.

The term “burden of proof” means the burden of producing evidence which fairly preponderates over the opposing evidence.

“Negligence” is the failure to exercise reasonable and ordinary care and by the term “reasonable and ordinary care” is meant that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances or conditions. Negligence may consist in the doing of some act which a reasonably prudent person would not do under the same or similar circumstances, or in the failure to do something which a reasonably prudent person would have done under the same or similar circumstances.

“Contributory negligence” is negligence or want of care, as herein defined, on the part of a person suffering injury or damage which proximately contributes to cause the injury and damage complained

of. Contributory negligence bars recovery on the part of a person suffering injury or damage, even though the opposing party is guilty of negligence.

Now, a master or employer has a positive duty to warn an employee of a hidden or latent danger, danger about which he knows or in the exercise of reasonable care should have known, existing in the tools or instrumentalities furnished by the employer for the employee's use, and this duty extends to all dangers in connection with the work or tools and instrumentalities of which he knows, or in the exercise of reasonable care, he should have known, which are not obvious and apparent to the employee.

You are, therefore, instructed that if you find by a preponderance of the evidence that defendants knew, or by the exercise of reasonable care should have known, that the ladder was not safe for use by the plaintiff and that such use was dangerous or likely to become dangerous when used, and that danger was neither obvious nor apparent to the plaintiff, then you are instructed that the defendants Swier had a positive duty to warn the plaintiff of said danger, if any, and if they failed in this respect, [672] I instruct you that they were negligent, and if such negligence was a proximate cause of plaintiff's injuries, your verdict should be in favor of the plaintiffs, unless you find that recovery by plaintiff is barred by contributory negligence or assumption of risk.

If you find by a fair preponderance of the evidence and under the Court's instructions that the plaintiff was negligent and that negligence, if any,

proximately and substantially contributed to cause her fall, then your verdict should be for the defendants.

Now, you gentlemen are the sole and exclusive judges of the evidence and of the credibility of the several witnesses and of the weight to be attached to the testimony of each. In weighing the testimony of the witness you have a right to consider his demeanor upon the witness stand, the apparent fairness or lack of fairness, the apparent candor or lack of candor of such witness, the reasonableness or unreasonableness of the story such witness relates, and the interest, if any, you may believe a witness feels in the result of the trial, and any other fact or circumstance arising from the evidence which appeals to your judgment as in anywise affecting the credibility of such witness, and to give to the testimony of the several witnesses just such degree of weight as in your judgment it is entitled to receive. [673]

You will be slow to believe that any witness has testified falsely in the case, but if you do believe that any witness has wilfully testified falsely to any material matter, then you are at liberty to disregard the testimony of such witness entirely, except insofar as the same may be corroborated by other credible evidence in the case.

Now, evidence of any oral admission claimed to have been made outside of court by any party in a civil case such as this ought to be viewed with caution.

Now, you have heard the testimony of witnesses

who have given evidence and testified as experts in this case. This class of testimony is proper and competent concerning matters involving special knowledge or skill, or experience upon some subject which is not within the realm of the ordinary experience of mankind and which requires special research and study to understand. The law allows those skilled in that special branch to express opinions and upon a hypothetical state of facts stated to them to say whether or not, according to their experience and research, a fact may or may not exist. But nevertheless, while their opinions are allowed to be given, it is entirely within the province of the jury to say what weight shall be given to them. The jurors are not bound by the testimony of the expert; his testimony is to be weighed as that of any other witness; just as far as his testimony [674] appeals to your judgment, convincing you of its truth, you should adopt it; but the mere fact that the witness was called as an expert and gave opinions upon a particular point, does not necessarily obligate the jury to accept his opinions or conclusions.

An employer has a duty to provide his employee with reasonably safe tools and appliances for the use required of them, and it is the employee's duty to exercise due care to avoid injury. These duties are reciprocal and exist by implication based upon the contract of employment. The implied duty of each is measured by the standard of ordinary care. The employer discharges his duty when he provides tools or appliances that are of ordinary character

and reasonably safe. He is not required to provide the newest and best.

The defendants were under a duty to furnish to Rose Wong a reasonably safe ladder for her use in her employment.

If you find from a preponderance of the evidence that the ladder furnished by defendants was not a reasonably safe ladder but was defective and that as a result of such defective condition of the ladder, plaintiff fell and sustained injuries, then you are further instructed that the defendants are responsible not only for the injuries sustained by plaintiff as a result of the fall from the [675] ladder, but that defendants are further responsible for any damages or injuries resulting to her by reason of the subsequent negligent acts or conduct, if any you find, of Dr. James E. Zimmerman and Yakima Valley Memorial Hospital Association, or either of them, in the care and treatment of the injuries sustained by said plaintiff as a result of the fall from the ladder.

Now, a plaintiff who is contributorily negligent, as such term has been defined to you, cannot recover from the defendants, irrespective of negligence, if any, on the part of the other party, the defendants.

A master must be held to be aware that, if he permits the appliances which he furnishes to his employees, for their use in the conduct of his business, to become defective, his employees in using the same in the reasonable and necessary course of their employment are likely to suffer.

One who, as servant or employee, enters into the service of another, assumes by his contract of employment the risk of all dangers ordinarily incident to the work upon which he engages, and also the extraordinary risks of employment if they are open and apparent, although due directly to the master's negligence.

If you find by a fair preponderance of the evidence and under the Court's instructions that the plaintiff [677] assumed the risk of what befell her, then she cannot recover from the defendants Swier, irrespective of negligence, if any, on their part.

Now, every accident does not necessarily establish a cause of action warranting recovery by the injured party. Accidents may occur for which no one is to blame.

An unavoidable accident is an unintended occurrence which could not have been prevented by the exercise of reasonable care. There is no liability for unavoidable accidents.

If this accident should be considered by you to have been unavoidable, then you should return a verdict for the defendants.

Now, if you return a verdict for the plaintiffs, then in the determination in the amount of the verdict, you should not indulge in speculation or conjecture, nor be swayed by sympathy or prejudice, but should be guided wholly by the evidence and law. Damages awarded should be compensatory. That is to say, you should award such an amount as in your judgment will fairly and adequately

pecuniarily compensate the injured person for the loss and damage sustained.

According to mortality tables, a woman of the age of Rose Wong, who on October 17, 1955, had attained the completed age of 45 years, has a life expectancy of [678] 25 years and 77 days.

It is proper for you to consider the life expectancy of Rose Wong in arriving at your verdict. However, it is not to be understood by you as a conclusive formula for mathematical computation of damages.

Her life expectancy, according to the mortality tables, may be considered together with all other evidence as to health, constitution, habits and occupation of Rose Wong.

Now, before I give you this instruction on the measure of damages, I wish to comment briefly that this instruction is not intended to indicate in any way what I think should be your verdict. I have no means of telling in advance whether you will find that the plaintiff is entitled to recover or find for the defendant. In case you do find for the plaintiff, then, of course, you will have use for these instructions as to measure of damages. For that reason I give them to you now.

If from the evidence and these instructions you find that the plaintiffs are entitled to recover, then you will award damages in such amount as in your judgment will fully compensate Rose Wong for the injuries and damages which she has sustained. In assessing such damages, you shall take into consideration the nature and extent of her injuries, the

physical and mental pain and suffering endured [679] by her prior to the time of this case, and the reasonable expenses for medical, hospital, nursing, drugs and orthopedic appliances, all insofar as the above items have been established by a preponderance of the evidence. You are also instructed that if you find that plaintiff has established by a preponderance of the evidence that she will necessarily endure in the future physical and mental pain and suffering resulting from said injuries, or that she has incurred any permanent injury or disability as a result of said injuries, or that her earning power or capacity for the future has been impaired as a proximate result of said injuries, then the law leaves it to the sound discretion of the jury to fix the amount of damages, taking into consideration those of the above items which have been established by a preponderance of the evidence.

In no event shall you bring in a verdict for more than or in excess of \$100,000, the amount asked for by the plaintiff in the pre-trial order.

Now, in arriving at your verdict, if you should find for the plaintiff, you are not permitted to add together different amounts representing the respective views of different jurors and to divide the total by twelve, or by some other figures, intending to represent the number of jurors or ideas represented. Any such figure would result in a "quotient verdict," would be contrary [680] to law, and would be in violation of your oaths. You are, of course, to give consideration to each other's views and reasoning and honestly endeavor to reach a

verdict, but such common agreement is to be based upon the final, honest belief of the jurors and must not be arrived at by that mechanical process of addition and division which constitutes a quotient verdict.

During the course of the trial I have occasionally asked questions of a witness in order to bring out facts not then fully covered in the testimony or not brought out clearly as I thought, anyway. Do not assume that because I, as Judge, have asked these questions, or participated to that extent in the trial, that I hold any opinion on the matters to which my question related. Remember at all times that the jury are at liberty to disregard all comments of the Judge in arriving at their own findings as to the facts, from the evidence in the case.

It is the duty of the Judge to admonish an attorney who, out of zeal for his cause, does something which is not in keeping with the rules of evidence or procedure. You are to draw no inference against the side to whom an admonition of the Judge may be addressed during the trial of any case.

It is the duty of attorneys on each side of a [681] case to object when the other side offers testimony or other evidence which counsel believes is not properly admissible. It is the duty of the Judge to decide whether under the rules of evidence such testimony or other evidence may be received.

Whenever the Judge sustains an objection to an offer of evidence, the jury are not to consider in their deliberations either the offer or the objection,

or the ruling the Judge in rejecting the offered evidence.

Thus, when the Judge sustains an objection to a question, the jury are to disregard the question, and may draw no inference from the wording of it or speculate as to what the witness would have said if permitted to answer. Nor may the jury assume an attorney has objected to a question because he expected the answer, if given, would be unfavorable to his side of the case.

By allowing evidence to be introduced over the objection of counsel, the Judge does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As stated before, the jury are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

I might also say that I tried to be fair and impartial in this case. I haven't intended to indicate what I thought your verdict should be or I haven't intended [682] to favor one side against the other. If anything I have said or done in the course of this trial should give you that impression, please wipe it from your minds and disregard it, because I have not intended to give any such impression.

Now, just a word about your deliberations here: the verdict, as I have said before, when it is finally agreed upon should reflect the best judgment of each individual juror, but you don't have to have very much experience in human affairs, and you men are experienced individuals, to appreciate that

no twelve people could agree upon any important question unless there is a good deal of spirit of give and take. And, of course, these issues have to be decided by juries, and in a case of this kind in Federal Court the verdicts have to be unanimous, so that my only suggestion is that you approach the question of decision in this case, the bringing in of your verdict, with an open mind and a cooperative spirit, and listen to what your fellow jurors have to say and consider what they have to say, although, of course, the final responsibility is on you and you should feel that the verdict represents your judgment when you agree to it. I would suggest, too, that it is best not to express too strong an opinion one way or the other when you first go into the jury room, because very often somebody says, "Well, I think so and so," [683] a matter of personal pride enters into it, and it is difficult to get them to change around and perhaps embarrassing for them to change, so I think that you should always, before making up your minds, discuss the matter openly and freely and have consideration and regard for the views of your fellow jurors.

Now, upon retiring to the jury room, the first thing you should do is select a foreman who will be, in effect, your chairman, and preside over your deliberations, and sign the verdict when you have agreed upon it.

You will take with you to the jury room the exhibits which have been admitted in the case, including the ladder here, if you want to take it in

and look at it, and also forms of verdict which have been prepared by the Clerk for your convenience, and these verdicts are very simple; they have the heading of the case and then one of them says, "We, the jury in the above entitled cause, find for the plaintiff in the sum of \$." If you choose that verdict you assign the amount which you decide to be the fair and proper award for the plaintiff's compensation and injuries.

The other verdict reads, "We, the jury in the above entitled cause, find for the defendants." You use this verdict in the event you find for the defendants. In any event, the foreman should sign the verdicts, and [684] if you agree upon it you will let one of the bailiffs know that you are ready to reach a verdict. I think you all understand that twelve of you must agree in order to reach a verdict.

I will ask the jury to step out for the time being.

(Whereupon, the jury retired from the courtroom.)

The Court: I had the jury step out so that counsel, in the jury's absence, may state their exceptions to the Court's instructions or failure to give proposed instructions.

Miss Loveland: If the Court please, we would like to except to the giving of the instruction concerning unavoidable accident, contributory negligence and assumption of risk, for the reason that not one of those are issues in this case nor has evidence been presented concerning them which would make them issues. As for the contributory

negligence only, there were not even hypothetical questions asked of an expert witness which would bring this into the case and make it an issue.

I would also like to except to that portion of one of the instructions which related to the newest and best type of equipment and appliances, for the same reason, that it has not been the contention of the plaintiffs at any time that they were required to furnish the newest or [685] best, nor is that an issue in this case.

We would like to enter our exception to the Court's failure to give or declining to give Plaintiffs' Requested Instructions Nos. 19, 20 and 21, inasmuch as we believe they set forth a correct statement of the law in this case.

The Court: Mr. Splawn?

Mr. Splawn: The defendants except to that portion of that instruction relating to the proposition that if the jury should find that the defendants were negligent that such instruction should be limited to the issues stated in the pre-trial order rather than in general to bring in other possible issues than contained in the pre-trial order.

The defendants except to that portion of the instruction which reads in effect as follows: That if the jury should find that the ladder was not reasonably safe that there should be deleted the other words immediately following which add other requirements, namely, the use of the word "defect" in addition to the term "reasonably safe."

The defendants except to the failure to give that

portion of their Proposed Instruction No. 10, reading as follows:

“An employer complies with his duty to provide reasonably safe tools or appliances [686] when he furnishes the employee with such instrumentalities as are in common use without radical defects in themselves even though it may be shown that there were better appliances for the particular purpose.”

The defendants except to the instruction concerning the duty of an employer or master to warn concerning latent dangers, in that such instruction should be limited to those dangers which constitute or would constitute negligence or would in the minds of the jury constitute less than the standard by which the employer is judged in the furnishing of a tool or appliance. [687]

* * * * *

Yakima, Washington, Monday, May 19, 1958
10:00 o'clock a.m.

(Argument of counsel in the matter of Wong vs. Swier, Civil No. 1137, Motion to Set Aside Verdict or in the Alternative for a New Trial.)

Oral Ruling of the Court

The Court: This case presented matters of unusual difficulty. I think we started having difficulty with it at the pre-trial conference, in getting the pre-trial order settled. I very carefully considered these authorities and cases that plaintiffs' counsel submitted here, and I don't believe they justify the assertion or contention that because there is evidence which the jury may believe that

there has been a tampering with or alteration of some piece of physical evidence in the case, that that would warrant the trial court in taking matters into his own hands and finding contrary to the verdict of the jury, entering a judgment in favor of the plaintiff and assessing the amount of damages or granting the amount that is asked for in the complaint.

In the first place, the very fact as to whether [692] there had been an alteration of this ladder by tightening the bolts was disputed. It presented a factual conflict. It's true that at least one witness, I believe it was Clark, for the plaintiff, testified that it was in a different condition than when he examined it, but under the modern practice and certainly the practice in Federal Courts, we no longer make a party responsible for the testimony of his witnesses whom he may call. He has the privilege of questioning his own witnesses or, if there is a conflict, the trier of the facts should decide that conflict, and I particularly recall the name of a witness now, I haven't my trial notes here, but the man who was in charge of this warehouse where this ladder was kept, what was his name?

Mr. Hudson: Rossow.

The Court: He testified, positively, that there had been no alteration.

Mr. Hudson: If the Court will pardon me, his testimony was that at the time I had been down there the looseness could be measured, but that at the present time the looseness could not be meas-

ured, that it had been altered. That was his testimony.

The Court: I think that at one point he testified that, it seems to me that there was testimony that it could be construed that there hadn't been any change.

Mr. Splawn: One witness, Mr. Moritz from Zillah, [693] who testified—he was my last witness—he had examined it a couple of weeks before the opening of the trial, and he said it was the same.

The Court: So that I felt that there was a factual conflict and a factual question to be decided by the jury. It's true that it appeared to me as being a rather one-sided one. If I had been the trier of the facts I would have found that there had been a change in the ladder because I think the evidence was to me very convincing and overwhelmingly so in favor of there having been some tightening of those bolts. How or why I could only conjecture, of course, and I think perhaps it would be fair under these authorities to ask that an inference be drawn against the defendants because of that situation of alteration of the ladder, and certainly that was done just about as skilfully, as forcefully, as I have ever heard anything done in a court of law. Capable counsel took full advantage of the circumstances of the alteration of that ladder and didn't let the jury forget it for an instant. I thought it was very forcefully presented.

If I grant a new trial, which is the only thing I could do here, I don't think I could take these matters into my own hands here and find out the

circumstances and assess the damages. I don't think that it would stand until it got to the Court of Appeals. If I did grant a [694] new trial I can't put that ladder back in the circumstances it was. The only thing we could do is put it back in here and present it to another jury. I don't think it could be presented any more forcefully than it was. Perhaps there could have been more favorable instructions presented to the jury, but in view of the situation here I don't believe there was any error in those instructions as I gave them. There were grave elements of weakness in this case from the jury's standpoint. I think rather than to say that the jury disregarded the alterations, I think it's just as logical and perhaps more so, in the light of the evidence here which I followed very closely, I think it would be just as logical and fair, I think, to assume that they did find an alteration and probably didn't like it any better than I did.

I don't like the tampering with evidence here in a case in any court of law, but I think it is just as logical to assume that they found that even if the ladder was in the condition which the witness said it was, as you claimed it was before that alteration, it was still a reasonably safe ladder and that its defect was not the cause of Mrs. Wong's fall and her injuries. Her testimony wasn't very convincing in the light of the inconsistent statements that she had made before, and I think, well, while I don't want to stress that point too much, I think [695] it's a matter of human nature to be

disappointed, particularly disappointed in a woman who has led a dedicated, Christian life. There was a grave element of weakness in that case so far as the jury is concerned, and I sympathize with the plaintiff, it's regrettable that they didn't get better results.

I don't believe that the situation calls for the rather drastic remedy of submitting it again to another jury and which, in all probability, I think, it would come out to about the same answer.

The motion for a new trial will be denied. [696]
* * * * *

[Endorsed]: Filed July 16, 1958.

[Endorsed]: No. 16116. United States Court of Appeals for the Ninth Circuit. Rose Wong and Kent Wong, Appellants, vs. Walter Swier and Laura A. Swier, Appellees. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

Filed: July 23, 1958.

Docketed: July 28, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 16116

ROSE WONG and KENT WONG, her husband,
Appellants,

vs.

WALTER SWIER and LAURA A. SWIER,
Appellees.

STATEMENT OF POINTS

Come now the appellants by their attorneys and make the following statement of points relied upon, to-wit:

1. All the evidence is insufficient in law to form a basis for a verdict in favor of the defendants.
2. The verdict is not sustained by sufficient evidence.
3. The Court erred in denying plaintiffs' Motion for a directed verdict in their favor at the close of all the evidence.
4. The evidence shows that the proximate cause of plaintiff Rose Wong's injuries was the defective ladder.
5. The evidence shows that the ladder was in the possession of the defendants Swier at all times and that said ladder had been tampered with.
6. That the Court erred in instructing the jury

relative to contributory negligence, relative to an unavoidable accident and relative to assumption of risk for the reason that said doctrines had no application in the case.

7. That the court erred in refusing plaintiff's requested Instruction No. 19.

8. That the Court erred in refusing plaintiffs' requested Instruction No. 20.

9. That the Court erred in refusing plaintiffs' requested Instruction No. 21.

10. Under the pre-trial order and all of the evidence in the case the verdict should be in favor of the plaintiffs.

11. That the jury misunderstood the measure of damages as shown by the question attached to the verdict and believed that they had to give \$100,000.00 or nothing.

12. That the Trial Court erred in denying plaintiffs' Motion to set aside Verdict and Judgment or in the alternative for a New Trial.

/s/ THOMAS K. HUDSON,

/s/ ALICE LOVELAND,

Attorneys for Appellants.

Certificate of Service by Mail Attached.

[Endorsed]: Filed August 12, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD
TO BE PRINTED

The Clerk will please print the following portions of the record, to-wit:

Complaint.

Motion to Make More Definite and Certain (Filed on behalf of defendants Swier).

Plaintiffs' Motion to add Party Plaintiff.

Order Adding Party Plaintiff.

Answer of defendants Swier.

Request and Motion for Jury Trial (By defendants Swier).

Objections of Plaintiffs to Request and Motion for Jury Trial.

Pre-Trial Order.

Plaintiffs' Tendered Instructions Nos. 19, 20 and 21.

Verdict of Jury with question attached.

Judgment on Jury Verdict.

Plaintiffs Motion to Set Aside Verdict and Judgment and to Enter Judgment for Plaintiffs or, in the alternative for New Trial.

Affidavit of Vincent A. Noga.

Affidavit of Robert Masterman.

Order Denying Motion to Set Aside Verdict, etc.

Plaintiffs' Notice of Appeal.

Cost Bond on Appeal.

Designation of Record.

Statement of Points to be Relied Upon.

Motion to file Designation of Record without Transcript.

Certificate of Mailing.

Order allowing Designation to be filed without Transcript.

(Plaintiffs' Exhibit 1—Ladder.)

Plaintiffs' Exhibit 16.

The following portions of the Record of Proceedings at the Trial.

* * * * *

Motion for Directed Verdict.

Court's Instructions and Exceptions thereto.

Oral Ruling of the Court.

Dated this 10th day of August, A.D., 1958.

/s/ THOMAS K. HUDSON,

/s/ ALICE LOVELAND,

Attorneys for Appellants.

[Endorsed]: Filed August 12, 1958. Paul P. O'Brien, Clerk.



[Title of Court of Appeals and Cause.]

AMENDED DESIGNATION BY APPELLEES OF ADDITIONAL PORTIONS OF RECORD TO BE PRINTED

The Clerk will please print the following additional portions of the record:

Answer of Defendants Swier with respect of Additional Party Plaintiff.

Application for Leave to Amend Answer of Defendants Swier to Complaint of Rose Wong.

Order of Court Granting Jury Trial.

Affidavit of Gordon Beck.

Affidavit of Homer B. Splawn.

Affidavit of Kenneth B. Elledge.

Affidavit of Ward M. Francis.

Affidavit of Robert Masterman (dated April 16, 1958).

Defendants' Exhibit No. 19.

Designation of Additional Portions of Record, Proceedings and Evidence to be Included in the Record on Appeal.

The following portions of the Record of Proceedings at the Trial:

Testimony of Walter Swier: Page 9, line 15 to line 23; Page 349, line 6 to line 20 and line 25.

Testimony of Cecil C. Clark: Page 397, line 17 to line 25.

Oral Decision of the Court With Respect of Appellants' Motion to Set Aside Verdict and Judgment.

Amended Designation by Appellees of Additional Portions of Record to be Printed.

Dated this 2nd day of September, 1958.

/s/ HOMER B. SPLAWN,
Attorney for Appellees.

[Endorsed]: Filed September 3, 1958. Paul P. O'Brien, Clerk.